TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~521.~~ 371

THE NORTHWESTERN UNION PACKET COMPANY, PLAINTIFF IN ERROR,

vs.

MARY McCUE, ADMINISTRATRIX OF THE ESTATE OF PATRICK McCUE, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

FILED DECEMBER 11, 1871.

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No. 521.

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1 Circuit court of the United States of America for the eastern district of Wisconsin.

UNITED STATES OF AMERICA,
Eastern District of Wisconsin, ss:

At a special term of the circuit court of the United States of America for the eastern district of Wisconsin, begun and held according to law, at the city of Milwaukee, on the first Monday (being the third day) of April, A. D. 1871—present, the Honorable Thomas Drummond, circuit judge, presiding, and the Hon. Andrew G. Miller, district judge, Charles S. Hamilton, marshal, Edward Kurtz, clerk—among other the following proceedings were had, to wit:

MARY MCCUE, ADMINISTRATRIX OF THE ESTATE of Patrick McCue, deceased,
vs.
THE NORTHWESTERN UNION PACKET COMPANY. } At law.

Be it remembered, that heretofore, to wit, at a stated term of the circuit court of the United States for the district of Wisconsin, begun and held according to law, at the city of Milwaukee, on the second Monday (being the twelfth day) of April, A. D. 1869, and on the twenty-sixth day of said term, to wit, on the second day of August, A. D. 1869, the following proceedings were had, to wit:

2 *Order docketing case removed from State court.*

MARY MCCUE, ADMINISTRATRIX OF THE ESTATE of Patrick McCue, deceased,
vs.
THE NORTHWESTERN UNION PACKET COMPANY. } At law.

This day came the defendant's counsel, Messrs. J. W. & A. L. Cary, and presented to the court copies of the process, pleadings, and proceedings in this case, certified from the circuit court for Crawford County, within this district, and of the bond, and order of said court for the removal of this case to this court, according to law. Whereupon it is ordered by the court, that the said certified copies be filed, and that the cause be entered on the law docket of this court, and be proceeded in in the same manner as if it had been commenced here by original process; which certified copies of papers are as follows:

Certified copies papers from State court.

Circuit court Crawford County.

STATE OF WISCONSIN, *County of Crawford, ss:*

MARY MCCUE, ADMINISTRATRIX OF THE ESTATE of Patrick McCue, deceased,
against
THE NORTHWESTERN UNION PACKET COMPANY.

Summons for relief, complaint not served.

The State of Wisconsin to the Northwestern Union Packet Company, the above-named defendant:

You are hereby summoned and required to answer the com-
3 plaint in this action, which will be filed in the office of the clerk of the circuit court of the county of Crawford aforesaid, at Prairie du Chien, in said county, and serve a copy of your answer on the subscribers, at their office in Prairie du Chien, in the said county of Crawford, within twenty days after the service of this summons on you, exclusive of the day of service. If you fail to answer the complaint within that time, the plaintiff will apply to the court for the relief demanded in the complaint.

Witness, Hon. J. T. Mills, judge of said court, this 23d day of September, 1868.

DUTCHER & WEBSTER,
Plaintiff's Attorney.

STATE OF WISCONSIN, *Crawford County, ss:*

J. H. Fonda being first duly sworn, deposes and says that he served the within summons upon the within-named defendant by delivering a true and compared copy thereof to Davidson, president of the Northwestern Union Packet Company, the defendant, and leaving the same with him, on the 23d day of September, 1868, at the town of Prairie du Chien, in the said county of Crawford and State of Wisconsin.

J. H. FONDA.

Subscribed and sworn to before me this 7th day of October, 1868.

S. A. TAYLOR,
Justice of the Peace.

4 *Copy of complaint.*

Circuit court Crawford County.

MARY MCCUE, ADMINISTRATRIX OF THE ESTATE of Patrick McCue, deceased, plaintiff,
against
THE NORTHWESTERN UNION PACKET COMPANY, defendant.

The complaint of the plaintiff in the above-entitled action respectfully shows to this court:

1st. That the plaintiff is the widow of the said Patrick McCue, deceased, and administratrix of his estate. That on the 7th day of September, 1868, letters of administration upon the estate of the said Patrick McCue were duly granted to this plaintiff, who was the lawful wife of the said Patrick McCue at the time of his death.

2nd. That the defendant, the Northwestern Union Packet Company, is, and was at the time the cause of action hereinafter set forth accrued, a foreign corporation created under the laws of the State of Iowa, and before and at the time of the grievances hereinafter mentioned, were, and now are, owners and proprietors of a line of steamboats, one of which steamboats was and is called and known by the name of the War Eagle, running and playing on the waters of the Mississippi River from and between the city of Dubuque, in the State of Iowa, and the city of St. Paul, in the State of Minnesota, which said steamboats were by them
used and employed in carrying and conveying passengers and
5 freight on the waters of the said Mississippi River, from the said city of Dubuque to the said city of St. Paul, and to divers other places on the said river between said cities.

3d. And being such owners and proprietors, the said defendants, on or about the 11th day of July, 1868, were then and there running upon the waters of said river, between the said points, the steamboat War Eagle, which was one of the aforesaid line, and used and employed by them in the business aforesaid; and that on or about the day last aforesaid the said steamboat War Eagle, in the course of its passage on the waters aforesaid, between said points, was landed at the wharf or landing-place on the said river, at the village of Prairie du Chien, in the said county of Crawford, and State of Wisconsin, engaged in and about the business of landing and receiving passengers, and unloading and taking on freight, and that while she, the said steamboat, was so lying at the said wharf or landing-place, the said Patrick McCue, husband of this plaintiff, in the pursuit of his ordinary, proper, and legitimate business, went on board of said boat, and on his return therefrom, in due time, and while the said Patrick McCue was walking and passing from the said boat to the adjacent shore along and upon the usual gangway-plank which had been shoved out from said boat for the purpose of pass-
6 ing and repassing persons to and from said boat, the said defendants, not regarding their duty in this behalf, by and through their servants and agents having charge and control of and managing the affairs and business and running of said boat, did then and there carelessly, negligently, unnecessarily, and recklessly, and without any fault of the said Patrick McCue, while the said Patrick McCue was still walking and being upon the said plank, and before he had time to get off from the same, pull in the said plank on to and aboard the said boat, out from under the feet of him, the said Patrick McCue, by means of which the said Patrick McCue was thrown violently off from the said plank, and fall and strike with great violence and deadly on to and upon the edge of a barge there lying and being alongside of said steamboat, crushing, bruising, and wounding the body of the said Patrick McCue, and thereby then and there causing his death, by reason of the carelessness, recklessness, and negligence of the said defendants, by and through their agents and servants as aforesaid, to wit, at the time and place last aforesaid, and without any negligence or carelessness on the part of the said Patrick McCue; that, by reason of the premises aforesaid, the plaintiff has sustained great pecuniary loss and damage
7 in the loss of the society of her said husband, Patrick McCue, and his care, attention, and support, and his assistance in rearing and educating her children, to wit, in the sum of five thousand dollars. Wherefore the plaintiff demands judgment against the said defendant for the sum of five thousand dollars, besides the costs of this action.

DUTCHER & WEBSTER,
Attorneys for Plaintiff.

Copy of answer.

Circuit court Crawford County.

MARY MCCUE, ADMINISTRATRIX OF THE ESTATE of Patrick McCue, deceased,
against
THE NORTHWESTERN UNION PACKET COMPANY.

And now comes the said defendant, The Northwestern Union Packet Company, by J. W. & A. L. Cary, its attorneys, and hereby protesting and objecting to the jurisdiction of this court over this action, and not

hereby waiving any objection it has to the jurisdiction of this court over this action, for answer to the plaintiff's complaint herein denies each and every allegation in said complaint contained, except the allegation that the said defendant is a foreign corporation, created under the laws of the State of Iowa.

And for a further answer to the said complaint, said defendant alleges that, at the time the said Patrick McCue was injured as complained of, he, the said Patrick McCue, was in the employ of said
8 defendant as one of its servants in and about the said steamboat War Eagle.

J. W. & A. L. CARY,
Def'ts' Att'ys.

STATE OF WISCONSIN, *County of Milwaukee, ss:*

Alfred L. Cary, being duly sworn, deposes and says that Messrs. Dutcher & Webster, the attorneys for the within-named plaintiff, reside at the village of Prairie du Chien, in the State of Wisconsin; that J. W. & A. L. Cary, the attorneys for the within-named defendant, reside in the city of Milwaukee, in said State; that between the said city of Milwaukee and said village of Prairie du Chien there is a regular communication by mail; that on the 5th day of December, A. D. 1868, this deponent deposited a copy of the within answer in the post-office in said city of Milwaukee, duly directed to the said Dutcher & Webster, at Prairie du Chien, Wisconsin, their place of residence as aforesaid, and that he paid the legal postage thereon.

ALFRED L. CARY.

Sworn to before me this 5th day of December, A. D. 1868.
ALANSON CARY,
Notary Public, Milwaukee County.

Circuit court Crawford County.

MARY MCCUE, ADMINISTRATRIX OF THE ESTATE of Patrick McCue, deceased,
against.
THE NORTHWESTERN UNION PACKET COMPANY.

9 Please to take notice that, on Tuesday, the 10th day of November, 1868, at the opening of the court on that day, or as soon thereafter as counsel can be heard, at the court-house in Prairie du Chien, in the county of Crawford and State of Wisconsin, we shall move the circuit court in and for said county of Crawford for an order removing the above-entitled cause, action, to the circuit court of the United States for the district of Wisconsin, according to the prayer of the annexed petition, and that said motion will be founded upon the annexed notice of retainer, petition, and bond.

Dated October 9th, 1868.
Yours, &c.,

J. W. & A. L. CARY,
Defendant's Attorneys, Milwaukee, Wis.

To Messrs. DUTCHER & WEBSTER,
Pl'ff's Att'ys.

State of Wisconsin, circuit court Crawford County.

MARY MCCUE, ADMINISTRATRIX OF THE ESTATE of Patrick McCue, deceased,
against
THE NORTHWESTERN UNION PACKET COMPANY.

To Messrs. DUTCHER & WEBSTER,
Attorneys for Plaintiff.

GENTS: Take notice that we have been, and are, retained to defend this action on behalf of the said defendant, The Northwestern Union Packet Company, and appear for it therein, and hereby demand a copy of the complaint in said action, which may be served upon us at our office in Mitchell's Bank building in the city of Milwaukee,
10 in the State of Wisconsin.

Dated October 9th, 1868.

Yours, &c.,

J. W. & A. L. CARY,
Defendant's Attorneys, Milwaukee, Wis.

Circuit court Crawford county.

MARY MCCUE, ADMINISTRATRIX OF THE ESTATE of Patrick McCue, deceased,
against
THE NORTHWESTERN UNION PACKET COMPANY.

To the circuit court for Crawford County:

Your petitioner, The Northwestern Union Packet Company, respectfully show to said court, that the above-named Mary McCue, administratrix of the estate of Patrick McCue, deceased, has commenced a suit and action against it, the said The Northwestern Union Packet Company, in the said circuit court for the county of Crawford in the State of Wisconsin, and which is the above-entitled action, and which is now pending in said court.

Your petitioner further shows and alleges that the said Mary McCue, administratrix, &c., plaintiff in said action, is a resident and citizen of the said State of Wisconsin, and that your petitioner, the said The Northwestern Union Packet Company, defendant to said action, is a corporation, created, organized, and existing under and by virtue of the laws of the State of Iowa, and is a citizen of the said State of Iowa.

11 Your petitioner further shows and alleges that, the matter in dispute in the above-entitled suit, cause, action, in which the said Mary McCue, administratrix of the estate of Patrick McCue, deceased, is plaintiff, and the said The Northwestern Union Packet Company, your petitioner, is defendant, exceeds the sum of five hundred dollars, exclusive of costs.

Your petitioner further shows and alleges that, it is now ready and willing, and hereby offers good and sufficient security for its entering in the circuit court of the United States for the district of Wisconsin on the first day of its next session copies of said process against it, and also for its there appearing and entering special bail in said cause, action, if special bail was originally required therein.

Your petitioner, The Northwestern Union Packet Company, defend-

ant in said cause, action, therefore prays that the said above-entitled action, cause, wherein said Mary McCue, administratrix of the estate of Patrick McCue, deceased, is plaintiff, and your petitioner is defendant, may be removed to the said circuit court of the United States for the district of Wisconsin, and that all proceedings in said action, cause, in the said circuit court for the county of Crawford, in the State of Wisconsin, may be stayed, and your petitioner will ever pray, &c.

The Northwestern Union Packet Company,
By J. W. & A. L. CARY, *its Attorneys*,
J. W. & A. L. CARY, *Def'ts Att'ys.*

12 STATE OF WISCONSIN,
County of Milwaukee, ss:

Alfred L. Cary, being duly sworn, deposes and says that the petitioner named in and who makes the foregoing and annexed petition, is a corporation created and organized under and by virtue of the laws of the State of Iowa, and that deponent is one of the attorneys for said petitioner, and knows the contents thereof, and that the same is true to his own knowledge, except as to those matters stated upon information and belief, and as to those matters he believes it to be true.

ALFRED L. CARY.

Sworn to before me this 9th day of October, 1868.
C. A. LOVELAND,
Notary Public, Mil. Co., Wis.

Circuit court Crawford County.

MARY MCCUE, ADMINISTRATRIX OF THE ESTATE of Partick McCue, deceased,
against
THE NORTHWESTERN UNION PACKET COMPANY.

Know all men by these presents that we, S. S. Merrill and David Ferguson, of Milwaukee, in the State of Wisconsin, are held and firmly bound unto Mary McCue, administratrix of the estate of Patrick McCue, deceased, or to her certain attorney, executors, adminstrators, or assigns, in the sum of five hundred dollars, lawful money of the United
13 States of America, for the payment of which, well and truly to be made, we bind ourselves, our and each of our heirs, executors, and administrators firmly by these presents, sealed with our seals and dated this 9th day of October A. D. 1868.

Whereas the above-named Mary McCue, administratrix of the estate of Patrick McCue, deceased, has commenced a suit, action, in the circuit court for Crawford County, in the State of Wisconsin, against the above-named The Northwestern Union Packet Company, and whereas the said The Northwestern Union Packet Company is about to file its petition to the said circuit court for Crawford County, praying for a removal of said action, cause, to the circuit court of the United States for the district of Wisconsin, in pursuance of the act of Congress in such case made and provided:

Now, therefore, the condition of this obligation is such that if the above-named, The Northwestern Union Packet Company, shall enter in the said circuit court of the United States for said district of Wisconsin, on the first day of its next session, copies of said process against it, and also if it shall then appear and put in special bail in said cause, if

special bail was originally required therein, then this obligation shall be void; otherwise, valid.

S. S. MERRILL. [SEAL.]
D. FERGUSON. [SEAL.]

14 STATE OF WISCONSIN,
County of Milwaukee ss:

S. S. Merrill and D. Ferguson being duly sworn, doth each for himself depose and say that he is worth the sum of one thousand dollars over and above all debts and exemptions, and that he is a householder and resident of this State.

S. S. MERRILL.
D. FERGUSON.

Sworn to before me this 9th day of October, 1868.
[SEAL.] JOHN JOHNSTON,
Notary Public, Milwaukee Co.

STATE OF WISCONSIN, *County of Milwaukee, ss:*

Alfred L. Cary being duly sworn, deposes and says, that on the 10th day of October, 1868, he deposited in the post-office in the city of Milwaukee, in the State of Wisconsin, a copy of each of the within papers, to wit, the within notice of motion, notice of retainer, petition and bond, which said copies were enclosed in an envelope and directed to Messrs. Dutcher & Webster, the attorneys for the within-named plaintiff, at Prairie du Chien, Wisconsin, their place of residence, and that he paid the legal postage thereon. Deponent further says that there is a regular communication by mail between Milwaukee and Prairie du Chien, aforesaid, and that the attorneys for the within-named defendant reside in said city of Milwaukee, and that Dutcher & Webster,
15 the attorneys for said plaintiff, reside at Prairie du Chien aforesaid.

ALFRED L. CARY.

Sworn to before me this 10th day of October, 1868.
C. A. LOVELAND,
Notary Public, Milwaukee Co., Wis.

Copy of order denying petition for removal.

Circuit court Crawford County.

MARY MCCUE, ADMINISTRATRIX OF THE ESTATE of Patrick McCue, deceased,
against
THE NORTHWESTERN UNION PACKET COMPANY.

On reading and filing the petition of the defendant in the above-entitled action, praying for a removal of said action to the circuit court of the United States for the district of Wisconsin, in pursuance of the act of Congress in such case made and provided, it is hereby ordered that the said petition be, and the same is hereby, denied.

Dated November 11th, 1868.
By the court.

J. T. MILLS, *Judge.*

Exception to order.—(Copy.)

Circuit court Crawford County.

MARY MCCUE, ADMINISTRATRIX OF THE ESTATE of Patrick McCue, deceased,
against
THE NORTHWESTERN UNION PACKET COMPANY.

And now comes the said defendant, The Northwestern Union
16 Packet Company, by J. W. & A. L. Cary, its attorneys, and excepts to the order entered in the above-entitled action, on the 11th day of November, A. D. 1868, denying said defendant's petition for the removal of said action to the circuit court of the United States for the district of Wisconsin, in pursuance of the act of Congress in such case made and provided.

Dated November 12th, 1868.

J. W. & A. L. CARY,
Defendant's Att'ys.

Copy of order of change of venue.

Circuit court Crawford County.

MARY MCCUE, ADMINISTRATRIX OF THE ESTATE of Patrick McCue, deceased,
against
THE NORTHWESTERN UNION PACKET COMPANY.

On motion of Messrs. Dutcher & Webster, plaintiff's attorneys, ordered that the order entered in this action on the 11th day of November, 1868, denying the petition of the defendant for the removal of this cause into the circuit court of the United States for the district of Wisconsin be, and the same hereby is, vacated and set aside.

And on further consideration of said petition of said defendant for the removal of said cause, and on motion of John W. & A. L. Cary, defendant's attorneys, ordered, that the prayer of said petition be,
17 and the same hereby is, granted; that this cause be removed to the said circuit court of the United States for the district of Wisconsin, and that the clerk of this court make out a copy of the process, pleadings, & all proceedings in this cause, under the seal of this court, to be filed in said circuit court of the United States, and that all further proceedings in this cause in this court be stayed.

Dated June 9th, 1869.

By the court.

J. T. MILLS, *Judge.*

Copy of record.

Crawford County circuit court.—June term A. D. 1869.—Third day of the term.—June 9th, 1869.

MARY MCCUE, ADMINISTRATRIX OF THE ESTATE of Patrick McCue, deceased,
against.
THE NORTHWESTERN UNION PACKET COMPANY.

On motion of Messrs. Dutcher & Webster, plaintiff's attorneys, ordered that the order entered in this action on the 11th day of November, 1868,

denying the petition of the defendant for the removal of this cause into the circuit court of the United States for the district of Wisconsin, be, and the same hereby is, vacated and set aside.

And on further consideration of said petition of said defendants, for the removal of said cause, and on motion of John W. & A. L. Cary, defendants' attorneys, ordered, that the prayer of said petition
18 be, and the same hereby is, granted; that this cause be removed to the said circuit court of the United States for the district of Wisconsin, and the clerk of this court make out a copy of the process, pleadings, & all proceedings in this cause under the seal of this court, to be filed in said circuit court of the United States, and that all further proceedings in this cause in this court be stayed.

Dated June 9th, 1869.

By the court.

J. T. MILLS, *Judge.*

STATE OF WISCONSIN,
Crawford County Circuit Court, ss :

I, James E. Campbell, clerk of said court, do hereby certify that I have compared the foregoing copies with the original summons, complaint, answer, petition, bond, notice of retainer, notice of motion to remove cause, order denying petition for removal, exceptions to order, order for change of venue and transcript of record, entered in the action therein entitled; that it is a correct transcript therefrom, and of the whole thereof, as the same remains of record and on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 19th day of July, A. D. 1869.

[SEAL.] JAMES E. CAMPBELL, *Clerk.*

Filed Aug. 2, 1869.

19 *Rule on pl'ff to file decl'n.*

And same day (August 2, 1869,) "on motion of J. W. & A. L. Cary, defendant's attorneys, ordered, that the plaintiff in the above-entitled suit file her declaration therein by the first Monday of September next."

AUGUST 20, 1869.—This day came the plaintiff, by her attorneys, Messrs. Dutcher & Webster, and Geo. C. Hazelton, and filed her declaration, as follows:

Declaration.

The United States circuit court, district of Wisconsin, of the Sept. term, 1869.

Mary McCue, administratrix of all and singular the goods, and chattels, and credits, which were of Patrick McCue, at the time of his death, who died intestate, and who is the widow of the said Patrick McCue, and a citizen of the State of Wisconsin, the plaintiff in this suit, by Dutcher & Webster and Geo. C. Hazelton, her attorneys, comes and complains of the "Northwestern Union Packet Company," a corporation created by the laws of the State of Iowa, and doing business in said State of Iowa, and a citizen of said State of Iowa, the defendant in this suit of a plea of trespass on the case.

For that whereas the said defendant, before and at the time of committing the grievances next hereinafter mentioned, was the owner

20 and proprietor of a line of steamboats, moved and propelled by steam, and running upon and navigating the Mississippi River from and between the city of Dubuque, in the State of Iowa, and the city of St. Paul, in the State of Minnesota and the intermediate points and ports on the said river; and that one of the several steamboats, owned by and belonging to the said defendant at the time of the grievances hereinafter complained of, was and is called and known by the name of the "War Eagle," and was then and there owned by the said defendant, and was then and there used by said defendant, and employed in transporting, carrying, and conveying passengers and freight on the waters of the Mississippi River from the said city of Dubuque to the said city of St. Paul, and from thence back to said city of Dubuque, and to divers other places on said river, between said cities, and being such owner and proprietor of said line of steamboats, and of said steamboat "War Eagle," which was one of the steamboats of said line, and used and employed by the said defendant in the business aforesaid, the said defendant, on or about the 11th day of July, 1868, was running said steamboat "War Eagle," upon the said waters of the Mississippi River, in and about the business
21 aforesaid of the said defendant, and that afterwards, to wit, on the day last aforesaid, the said steamboat "War Eagle," in the course of its passage on the waters aforesaid, between said cities, was landed and stopped by the said defendant, its agents, servants, and employees, then and there having charge and control of said steamboat, and then and there acting in and about the business of the said defendant at the wharf and landing-place on the said river, at the village of Prairie du Chien, in the county of Crawford and State of Wisconsin; and said defendant and its agents, then and there having charge and control of said steamboat War Eagle, for and in behalf of said defendant, were then and there, for a long space of time, to wit, for the space of one hour, engaged in and about the business of landing and receiving on board passengers, and in unloading and in receiving freight.

And the plaintiff avers that while the said defendant and its agents and servants, having the management of said steamboat War Eagle, were so as aforesaid engaged at the wharf and landing-place, at said Pairie du Chien, the said defendant, by its agents, who had the control and management of said "War Eagle," employed the said Patrick McCue, now deceased, and who was then, and until after his
22 death, the lawful husband of the said plaintiff, for a short space of time, to wit, for the space of one hour, to assist and to render manual labor and services in the loading and unloading said steamboat War Eagle; and that the said Patrick McCue, deceased, then and there, for a small consideration promised and agreed to be paid to him, said Patrick McCue, by said defendant, went upon said steamboat War Eagle at the solicitation and request of said defendant and its agents, and then and there worked for the said defendant, and was engaged in and about the defendant's business, and served the said defendant as he was ordered and directed to do, for a short space of time, to wit, for the space of one hour; and the plaintiff avers that, after the said Patrick McCue had worked for the said defendant for and during the space of time required of him by said defendant, the said defendant settled with the said Patrick McCue for his said services and labors, and thereupon the said Patrick McCue immediately hastened and attempted to get off from said "War Eagle" and upon said wharf before said "War Eagle" should take in her gangway-plank and start on

her voyage or trip; and the plaintiff avers that the said Patrick
23 McCue, deceased, immediately after he was paid off by said defendant for his labor and services, and after his term of labor & engagement had ceased & was ended, used great care, exertion, and diligence in then and there, to wit, at the wharf at Prairie du Chien aforesaid, attempting and endeavoring to get off from said steamboat "War Eagle" to and upon said wharf & landing-place, and that while he was so using great care, exertion, and diligence in so endeavoring to get off from said steamboat, he, the said Patrick McCue, now deceased, then and there got upon the gangway-plank, so called, which extended from the said steamboat to and upon the wharf & landing-place, and which said gangway-plank was then and there designed and intended by said defendant to be walked upon and travelled over by passengers and other persons in coming upon & in going off from said boat, and which said gangway-plank was the usual and only way and means of passengers & other persons to be used by them in coming upon & in getting off from said steamboat.

And the plaintiff avers that while the said Patrick McCue, deceased, was on said gangway-plank, and was then and there using great care, exertion, and diligence to pass from said steamboat to said wharf
24 and landing, the said defendant and its agents, then and there, on the day last aforesaid, at Prairie du Chien aforesaid, having charge & control of said steamboat, and managing the affairs and business of said defendant, did then and there, regardless of their duty in the premises, carelessly, negligently, unnecessarily, recklessly, and without any just or reasonable cause, and without any fault of the said Patrick McCue, while the said Patrick McCue was still then and there walking and being upon said gangway-plank, and was then and there walking towards the landing and endeavoring to get ashore upon the wharf, and before the said Patrick McCue had had time to get off from said gangway-plank, and to get ashore, did pull in said gangway-plank on to and aboard said steamboat, and from under the feet of the said Patrick McCue, by means of which the said Patrick McCue was then and there thrown violently off from the said plank, and did fall and strike with great violence and deadly force to and upon the edge of the wharf, barge, and timbers then and there lying and being alongside of said steamboat, crushing, bruising, and wounding the body of the said Patrick McCue, and thereby then and there causing the death
25 of the said Patrick McCue, by reason of the carelessness, negligence, and recklessness of the said defendant, by & through its agents and servants as aforesaid, to wit, at the time and place aforesaid, and without any negligence or carelessness on the part of the said Patrick McCue.

And the plaintiff avers that, by reason and on account of the great bodily injuries so as aforesaid then and there caused by the said defendant as aforesaid to and upon the said Patrick McCue, who was then and there the lawful husband of this plaintiff, the said Patrick McCue, afterwards, to wit, on the day and year last aforesaid, died, leaving the said plaintiff with six small children.

And the plaintiff avers that, by reason of the premises, the plaintiff has sustained great pecuniary loss & damages, to wit, in the sum of five thousand dollars, in the loss of the society of her said husband, Patrick McCue, and his care, attention, and support, and assistance in rearing, supporting, and educating her children.

Yet the said defendant, not regarding its duty, obligations, and liability in the premises, hath not paid the said sum, or any part

thereof, to the said Patrick McCue in his life-time, or to the said
26 plaintiff, administratrix as aforesaid, since the death of the said Patrick McCue, although often requested so to do; but so to do hath hitherto wholly refused, and still refuses to pay the same, or any part thereof, to the said plaintiff, administratrix as aforesaid, and widow of the said Patrick McCue, deceased, and although an action hath accrued to the said plaintiff to have and recover the said sum of five thousand dollars, by reason of the premises; to the damage of the said plaintiff, as administratrix as aforesaid, of five thousand dollars; and therefore she brings her suit, &c.

And the said plaintiff brings into court here the letters of administration of all and singular the goods, chattels, and credits which were of the said Patrick McCue at the time of his death, and which letters were, after the death of the said Patrick McCue, to wit, on the seventh day of September, 1868, at the county of Crawford, in said State of Wisconsin, granted to the said plaintiff by the county judge of said Crawford County, which give sufficient evidence to the said court here of the grant of administration to the said plaintiff as aforesaid, &c.

DUTCHER & WEBSTER, &
GEO. C. HAZELTON,
Pl'ff's Att'ys.

27 SEPTEMBER 13, 1869.—This day came the defendants, by its attorneys, Messrs. J. W. & A. L. Cary, and filed its demurrer as follows:

Demurrer.

Circuit court of the United States for the district of Wisconsin, of the September term, A. D. 1869.

THE NORTHWESTERN UNION PACKET COMPANY
ads.
MARY MCCUE, ADMINISTRATRIX OF THE ESTATE of Patrick McCue, deceased.

And the said defendant, by J. W. & A. L. Cary, its attorneys, comes and defends the wrong and injury, when, &c., and says that the said declaration and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law for the said plaintiff to have or maintain her aforesaid action thereof against the said defendant, and it, the said defendant, is not bound by law to answer the same, and this it is ready to verify: Wherefore, by reason of the insufficiency of the said declaration in this behalf, the said defendant prays judgment, and that the said plaintiff may be barred from having or maintaining her aforesaid action thereof against it, &c.

J. W. & A. L. CARY,
Defendant's Att'ys.

We hereby certify that, in our opinion, the above demurrer is well founded.

J. W. & A. L. CARY,
Def't's Att'ys.

28 And same day (Sept. 13, 1869) came the plaintiff, by her attorneys, & filed her joinder in demurrer, as follows, to wit:

Joinder in demurrer.

The United States circuit court, district of Wisconsin.

MARY MCCUE, ADMINISTRATRIX OF THE ESTATE of Patrick McCue, deceased,
vs.
THE NORTHWESTERN UNION PACKET COMPANY.

And the said plaintiff saith that the said declaration, and the matters therein contained, in manner and form as the same are above stated and set forth, are sufficient in law for her, the said plaintiff, to have and maintain her aforesaid action thereof against the said defendant, and the said plaintiff is ready to verify and prove the same, as the court shall direct and award: Wherefore, inasmuch as the said defendant hath not answered the said declaration, nor hitherto in any manner denied the same, the said plaintiff prays judgment, and her damages by her sustained on occasion of the committing of the said grievances, to be adjudged to her, &c.

DUTCHER & WEBSTER, &
GEO. C. HAZELTON,
Pl'ff's Att'ys.

29 And afterwards, to wit, at a stated term of said court begun and held at the city of Milwaukee on the second Monday (being the thirteenth day) of September, A. D. 1869, and on the eighteenth day of said term, to wit, on the 18th day of October, A. D. 1869, present the Hon. Andrew G. Miller, district judge, presiding, the following proceedings were had, to wit:

MARY MCCUE, ADMINISTRATRIX OF THE ESTATE of Patrick McCue, deceased,
vs.
THE NORTHWESTERN UNION PACKET COMPANY. } At law.

This day came the parties by their counsel, and the demurrer to the declaration being argued, on consideration thereof it is ordered by the court that said demurrer be overruled, and that the defendant file its plea by the first Monday of November next, or its default will be entered.

NOVEMBER 4, 1869.—This day came the defendant, by its attorneys, and filed its plea, as follows:

Plea.

Circuit court of the United States for the district of Wisconsin, of the September term, A. D. 1869.

THE NORTHWESTERN UNION PACKET COMPANY
ads.
MARY MCCUE, ADMINISTRATRIX OF THE ESTATE of Patrick McCue, deceased.

30 And the said defendant, by J. W. & A. L. Cary, its attorneys, comes and defends the wrong and injury, when, &c., and says that it is not guilty of the said supposed grievances above laid to its

charge, or any or either of them, or any part thereof, in manner and form as the said plaintiff hath above thereof complained against it; and of this, it, the said defendant, puts itself upon the country, &c.

J. W. & A. L. CARY,
Defendant's Att'ys.

And afterwards, to wit, at a stated term of the circuit court of the United States for the eastern district of Wisconsin, begun and held according to law at the city of Milwaukee on the first Monday (being the third day) of October, A. D. 1870, and on the seventh day of said term, to wit, on the tenth day of October, A. D. 1870, present, the Hon. Thomas Drummond, circuit judge, presiding, and the Hon. Andrew G. Miller, district judge, the following proceedings were had, to wit:

Trial.

MARY MCCUE, ADMINISTRATRIX OF THE ESTATE of Patrick McCue, deceased,
vs.
THE NORTHWESTERN UNION PACKET COMPANY. } At law.

31 This day came the parties by their counsel, and the issue herein came on to be tried, whereupon a jury was called to try the same, who came, to wit, Michael Bodden, Nathan B. Chase, Hiram L. Hurlbut, Sidney Buell, John Heath, Robert Trumble, Bidwell W. Brown, William Langton, George Bowman, Charles Henry, Eleazer Everett, and Samuel Hoyt, twelve free, honest, and lawful men of the district, who were severally sworn and empanneled, and the trial not being concluded, the same was adjourned until to morrow morning.

And afterwards, to wit, on the eighth day of said term, to wit, on the eleventh day of October, A. D. 1871, the following proceedings were had, to wit:

Verdict.

This day came the parties, by their counsel, and the trial of the issue herein was resumed. And the jurors of the jury aforesaid being charged by the court, on their said oaths respectively do say that the defendant is guilty in manner and form as the plaintiff has herein declared against it, and assess the damages to the said plaintiff at four thousand dollars. And came the defendant' counsel, and moved the court for a new trial for reasons filed as follows, to wit:

Motion.

United States circuit court, eastern district of Wisconsin.

32 THE NORTHWESTERN UNION PACKET Company
ads.
MARY MCCUE, ADMINISTRATRIX OF THE ESTATE of Patrick McCue, deceased.

And now comes the said defendant, the Northwestern Union Packet Company, by John W. & A. L. Cary, its attorneys, and moves the court

now here, to set aside the verdict of the jury rendered in this suit, and for a new trial herein, for the following reasons, to wit:

1st. For that the damages assessed by the jury on the trial of this suit, and returned by their verdict herein, are excessive.

2nd. That said verdict is contrary to the charge and instructions of the court to said jury.

3d. That said verdict is against the law and evidence.

4th. That the court erred in not giving to said jury the several instructions asked by defendant's counsel.

Dated October 11th, 1870.

JOHN W. & A. L. CARY,
Defendant's Att'ys.

And afterwards, to wit, on the twenty-ninth day of said term, to wit, on the fourth day of November, A. D. 1870, the following proceedings were had, to wit:

Argument of motion for new trial.

33 This day the motion of the defendant, for a new trial, came on to be heard, and was argued by Messrs. Cary & Cottrill, for said defendant, and by Mr. Lakin for the plaintiff, and being submitted, the court held the same under advisement.

And afterwards, to wit, on the thirtieth day of said term, to wit, on the fifth day of November, A. D. 1870, the following proceedings were had, to wit:

New trial granted, &c.

This day came the parties, by their counsel, and, on consideration of the motion of the defendant for a new trial, it is ordered by the court that a new trial be, and hereby is, granted, the costs to abide the final result; and that the plaintiff have leave to amend her declaration.

NOVEMBER 10, 1870.

This day came the plaintiff, by her attorneys, and filed an amendment to her declaration, as follows:

Amendment to declaration.

U. S. circuit court, eastern district of Wisconsin.

MARY MCCUE, ADMINISTRATRIX OF THE ESTATE of Patrick McCue, deceased,
vs.
THE NORTHWESTERN UNION PACKET COMPANY.

Amendment to plaintiff's declaration by adding a count to stand as the second count.

34 SECOND COUNT.—And for that whereas the said defendant heretofore afterwards, to wit, before and at the time of committing the grievances next hereinafter mentioned, was the owner and proprietor of a line of steamboats, moved and propelled by steam, and running upon and navigating the Mississippi River from and between the city of Dubuque, in the State of Iowa, and the city of St. Paul, in

the State of Minnesota, and the intermediate points and ports on said river; and that one of the several steamboats, owned by and belonging to the said defendant, at the time of the grievances hereinafter complained of, was and is called and known by the name of the "War Eagle," and was then and there owned by the said defendant, and was then and there used by said defendant and employed in transporting, carrying, and conveying passengers and freight on the waters of the Mississippi River, from the said city of Dubuque to the said city of St. Paul, and from thence back to said city of Dubuque, and to divers other places on said river between said cities.

And, being such owner and proprietor of said line of steamboats and of said steamboat "War Eagle," which was one of the steamboats of said line, and used and employed by said defendant in the
35 business aforesaid, the said defendant, on or about the 11th day of July, 1868, was running said steamboat "War Eagle" upon the said waters of the Mississippi River in and about the business aforesaid of the said defendant; and that afterwards, to wit, on the day last aforesaid, the said steamboat "War Eagle," in the course of its passage on the waters aforesaid between said cities, was landed and stopped by said defendant, its agents, servants, and employees, then and there having charge and control of said steamboat, and then and there acting in and about the business of the said defendant, at the wharf and landing-place on the said river, at the village of Prairie du Chien, in the county of Crawford, and State of Wisconsin; and said defendant and its agents, then and there having charge and control of said steamboat "War Eagle," for and in behalf of said defendant, were then and there, for a long space of time, to wit, for the space of one hour, engaged in and about the business of landing and receiving on board passengers, and in unloading and receiving freight.

And the plaintiff avers that while the said defendant and its agents and servants having the management of said steamboat "War Eagle" were so as aforesaid employed at the wharf and landing-place
36 at said Prairie de Chien, the said defendant, by its agents, who had the control and management of said "War Eagle," in and upon said steamboat employed the said Patrick McCue (who for a long time before then, and who was then and there a resident of Prairie du Chien, in said State of Wisconsin, and who is now deceased, and who was then and until after his death the lawful husband of the said plaintiff) for a short space of time, to wit, for the space of one hour, to assist and to render manual labor and services in the loading and unloading said steamboat "War Eagle;" and that the said Patrick McCue, deceased, then and there, for a small consideration which was promised and agreed to be paid to him, said Patrick McCue, by the said defendant, at, in, and upon the deck of said steamboat War Eagle, where the contract was made, at the solicitation and request of the said defendant and its agents, then and there worked for the said defendant, and was engaged in and about the defendant's business, and served the said defendant as he was ordered and directed to do, in and upon said steamboat, for a short space of time, to wit, for the space of one hour.

And the plaintiff avers that the said Patrick McCue had been for and during a long time before the said 11th day of July, 1868, a resident
37 and householder, and head of a family, at Prairie du Chien; and that said Patrick McCue, deceased, had not before the day last aforesaid, neither from time to time, at intervals or otherwise, been an employee in the employment of the said defendant, and the plaintiff avers that the said Patrick McCue, at the time of the grievances com-

mitted by the said defendant upon the said Patrick McCue, deceased, herein set forth, the said Patrick McCue was not in the employment of the said defendant, and was not an employee of said defendant. The plaintiff avers that after the said Patrick McCue had worked for, and during the time which he, said Patrick McCue, had been employed to work for said defendant, the said Patrick was required by the defendant to go from the deck of said steamboat up to the office of the clerk of said steamboat to get and receive his pay, and that although the said Patrick McCue was under no duty or obligation to go up to the clerk's office, yet the said Patrick McCue, deceased, as a matter of favor to the said defendant, did as he was then and there requested to do by said defendant, after his term of labor had ceased and was ended, and after
38 the relation of employer and employee theretofore existing between said defendant and said Patrick McCue had been dissolved and terminated by limitation and settlement, and after the expiration of the time during which said Patrick McCue had before then agreed to work for the said defendant, and after the time had elapsed at and before which the said defendant was bound to pay, and ought to have paid, the said Patrick McCue, deceased, for his services aforesaid, said Patrick McCue went up from the deck of said steamboat to collect and to receive his pay for the time which he, the said Patrick McCue, had so as aforesaid worked for said defendant, and which said time had before then elapsed, and the said Patrick McCue did then and there receive his pay for his labor and services aforesaid.

And the plaintiff avers that the said Patrick McCue, after the termination of the time and term of labor aforesaid which had elapsed and was terminated and ended before the cause of action herein set forth accrued, the said defendant was under no duty or obligation thereafter to work for or serve the said defendant. And the plaintiff avers that the said Patrick McCue was never in the employ of the said defendant at any
39 time after his term of labor aforesaid ended, or at any time after said Patrick McCue received his pay for the work aforesaid, which said work was done for said defendant, and was terminated before the injury herein complained of was done by the defendant to said Patrick McCue.

And the plaintiff avers that after the said Patrick McCue had worked for said defendant for and during the space of time required of him by said defendent, the said defendant settled with the said Patrick McCue for his said services and labor, and thereupon the said Patrick McCue immediately hastened and attempted to get off from said boat "War Eagle" and upon said wharf before said "War Eagle" should take in her gangway-plank and start on her voyage or trip.

And the plaintiff avers that the said Patrick McCue, deceased, immediately after he was paid off by said defendant for his labor and services, and after his term of labor and engagement had ceased and was ended, used great care, exertion, and diligence in then and there, to wit, at the wharf at Prairie du Chien aforesaid, attempting and endeavoring to get off from said steamboat "War Eagle" to and upon said wharf and landing-place, and that while he was so using great care, exertion, and diligence in so endeavoring to get off from said steamboat, he, the said
40 Patrick McCue, now deceased, then and there got upon the gangway-plank, so called, which extended from the said steamboat to and upon the wharf and landing-place, and which said gangway-plank was then and there designed and intended by said defendant to be walked upon and travelled over by passengers and other persons in going upon and in going off from said boat, and which said gangway-

plank was the usual and only way and means of passengers and other persons to be used by them in coming upon and in getting off from said steamboat.

And the plaintiff avers that while the said Patrick McCue, deceased, was on said gangway-plank, and was then and there using great care, exertion, and diligence, to pass from said steamboat to said wharf and landing, the said defendant and its agents then and there, on the day last aforesaid, at Prairie du Chien aforesaid, having charge and control of said steamboat, and managing the affairs and business of said defendant, did then and there, regardless of their duty in the premises, carelessly, negligently, unnecessarily, recklessly, and without any just or reasonable cause, and without any fault of the said Patrick McCue, while the said Patrick McCue was still then and there walking and being upon said gangway-plank, and was then and there walking
41 towards the landing, and endeavoring to get ashore upon the wharf, and before the said Patrick McCue had had time to get off from said gangway-plank and to get ashore, did pull in said gangway-plank on to and aboard said steamboat, and from under the feet of the said Patrick McCue, by means of which the said Patrick McCue was then and there thrown violently off from the said plank and did fall and strike with great violence and deadly force to and upon the edge of the wharf, barge, and timbers, then and there lying and being alongside of said steamboat, crushing, bruising, and wounding the body of the said Patrick McCue, and thereby then and there causing the death of the said Patrick McCue by reason of the carelessness, negligence, and recklessness of the said defendant, and by and through its agents and servants as aforesaid, to wit, at the time and place aforesaid, and without any negligence or carelessness on the part of the said Patrick McCue.

And the plaintiff avers that by reason and on account of the great bodily injuries, so, as aforesaid, then and there caused by said defendant, as aforesaid, to and upon the said Patrick McCue, who was then and there the lawful husband of this plaintiff, the said Patrick McCue afterwards, to wit, on the day and year last aforesaid, died, leav-
42 ing the said plaintiff with six small children.

And the plaintiff avers that, by reason of the premises, the plaintiff has sustained great pecuniary loss and damage, to wit, in the sum of five thousand dollars, in the loss of the society of her said husband, Patrick McCue, and his care, attention, and support, and assistance in rearing, supporting, and educating her children.

Yet the said defendant, not regarding its duty, obligations, and liabilities in the premises, hath not paid the said sum or any part thereof to the said Patrick McCue in his life-time, or to the said plaintiff, administratrix as aforesaid, since the death of the said Patrick McCue, although often requested so to do, but so to do hath hitherto wholly refused, and still refuses to pay the same or any part thereof to the said plaintiff, administratrix, as aforesaid, and widow of the said Patrick McCue, deceased, and although an action hath accrued to the said plaintiff to have and recover the said sum of five thousand dollars by reason of the premises, to the damage of the said plaintiff, as administratrix, as aforesaid, of five thousand dollars, and therefore she brings her suit, &c.

And the said plaintiff brings into court here the letters of administration of all and singular the goods, chattels, and credits,
43 which were of the said Patrick McCue, at the time of his death, and which letters were, after the death of the said Patrick McCue, to wit, on the seventh day of September, 1868, at the county of

Crawford, in said State of Wisconsin, granted to the said plaintiff, by the county judge of said Crawford County, which give sufficient evidence of the granting of administration to the said plaintiff as aforesaid, &c.

DUTCHER & WEBSTER, &
GEORGE C. HAZELTON,
Plaintiff's Attorneys.

And afterwards, to wit, on the thirty-third day of said term, to wit, on the fourteenth day of November, A. D. 1870, the following proceedings were had, to wit:

Argument of petition for removal to west'n dist.

This day came the plaintiff, by her counsel, and presented to the court her petition, in writing, as herein filed, praying that this cause be removed for further proceedings to the circuit court of the United States for the western district of Wisconsin; and came the defendants' counsel and filed their answer to said petition, and, being argued, the same was held under advisement.

And afterwards, to wit, on the forty-first day of said term, to wit, on the twenty-fifth day of November, A. D. 1870, the following proceedings were had, to wit:

Order denying petition for removal.

44 This day came the parties, by their counsel, and the petition of the plaintiff for an order of removal of this cause to the western district of this State having been submitted upon the stipulation and papers on file, on consideration thereof it is ordered by the court that the said petition be, and hereby is, denied.

And now at this same term, to wit, April term, 1871, and on the ninth day thereof, to wit, on the thirteenth day of April, A. D. 1871, present the Hon. Thomas Drummond, circuit judge, presiding, and also present the Hon. Andrew G. Miller, district judge, the following proceedings were had, to wit:

Second trial.

This day came the parties, by their counsel, and by consent the plea of the defendant, filed November 4, 1869, is to stand as its plea to the declaration as amended; whereupon the issue herein came on to be tried, and a jury was called to try the same, who came, to wit, Pierce Grace, William H. Prentice, Luis S. Jermain, John C. Marshall, John Ewing, G. E. Weiss, George Snyder, Samuel B. Kellogg, John W. Taylor, Thomas Snyder, Albert Alden, and Jesse C. Shepard, twelve free, honest, and lawful men of the district, who were severally sworn and empanneled, and the trial not being concluded, the same was adjourned until to-morrow morning.

45 And afterwards, to wit, on the tenth day of said term, to wit, on the fourteenth day of April, A. D. 1871, the following proceedings were had, to wit:

Verdict.

This day came the parties, by their counsel, and the trial of the issue herein was resumed. And the jurors of the jury aforesaid being charged by the court, on their said oaths respectively do say that the defendant is guilty in manner and form as the plaintiff hath herein declared against it, and assess the damages to the said plaintiff at the sum of two thousand eight hundred dollars.

And afterwards, to wit, on the twelfth day of said term, to wit, on the seventeenth day of April, A. D. 1871, the following proceedings were had, to wit:

Motion for new trial.

This day came the defendant's counsel and moved the court for a new trial for reasons filed as follows, to wit:

Circuit court of the United States for the eastern district of Wisconsin.

MARY MCCUE, ADMINISTRATRIX OF THE ESTATE of Patrick McCue, deceased,
vs.
THE NORTHWESTERN UNION PACKET COMPANY.

And now comes the said defendant by Carys & Cottrill, its attorneys, and moves the court now here to set aside the verdict of the jury
46 rendered in this suit, and that a new trial be granted herein, and for reasons specifies the following:

1st. That said verdict is against the law.

2nd. That said verdict is against the evidence.

3d. That said verdict is contrary to the charge of the court.

4th. That said jury did not find specially whether said Patrick McCue, plaintiff's intestate, was an employee of defendant at the time he received the injury complained of, and as they were directed to find by the court.

5th. That the damages assessed by the jury, and returned by them in their verdict, are excessive.

CARYS & COTTRILL,
Def't's Att'ys.

And afterwards, to wit, on the fifteenth day of said term, to wit, on the twentieth day of April, A. D. 1871, the following proceedings were had, to wit:

Motion for new trial overruled, & judgment.

This day came the parties, by their counsel, and the motion of the defendant's counsel for a new trial being submitted, on consideration thereof it is ordered by the court that the said motion be, and hereby is, overruled.

Whereupon it is considered and adjudged by this court now here that the plaintiff do have and recover of the said defendant, The Northwestern Union Packet Company, the sum of two thousand eight hun-
47 dred dollars damages, so as aforesaid assessed by the jury, together with eighty-seven dollars and thirty cents, her costs about

her said suit, in this behalf by her expended, and that she have execution therefor.

Judgment-roll signed April 20th, A. D. 1871.

EDWARD KURTZ, *Clerk.*

Damages, $2,800.00; costs, 87.30—$2,887.30.

Judgment-roll filed April 20th, A. D. 1871, at five o'clock p. m.

EDWARD KURTZ, *Clerk.*

And same day bill of exceptions signed and filed as follows, to wit:

Bill of exceptions.

Circuit court of the United States, eastern district of Wisconsin.

MARY MCCUE, ADMINISTRATRIX OF THE ESTATE of Patrick McCue, deceased,
vs.
THE NORTHWESTERN UNION PACKET COMPANY.

And afterwards, to wit, at the April term of said court, begun and holden at the United States court-room, in the city of Milwaukee, in said eastern district of Wisconsin, on the first Monday of April, A. D. 1871, to wit, on the 13th day of April, A. D. 1871, as yet of said term, the issue joined in this cause came on to be tried in said court before the Hon. Thomas Drummond, circuit judge in and for the
48 seventh judicial circuit of the United States, and the Hon. Andrew G. Miller, district judge of the United States in and for the eastern district of Wisconsin, sitting in said court. And thereupon came the jurors, twelve good and lawful men, who were duly empannelled, tried, and sworn to try said issue, and also came as well the counsel for the respective parties.

And thereupon the plaintiff, to maintain and support said issue on her part, gave evidence tending to show that the steamboat called the "War Eagle" was on the 11th day of July, A. D. 1868, owned by defendant, and at that time was used by defendant in carrying freight and passengers upon the Mississippi River, from the city of Dubuque, in the State of Iowa, to the city of St. Paul, in the State of Minnesota, and intermediate points; that on the 11th day of July, A. D. 1868, Patrick McCue, plaintiff's intestate, and at and for several years next prior to his death the husband of plaintiff, resided, and had so resided for some eight years next prior to said date, at the village of Prairie du Chien, in the State of Wisconsin, a point on said Mississippi River, intermediate between said cities of Dubuque and St. Paul; that on the said 11th day of July, A. D. 1868, the said Patrick McCue was and had been, during nearly all the time he had so resided at Prairie du Chien, employed by the
49 railroad company whose railroad terminates at said Prairie du Chien, as a common laborer in and about the depot and freight-warehouse of said railroad company, at Prairie du Chien, and that his hours of labor for said railroad company generally commenced about six o'clock in the morning and terminated about six o'clock in the evening, and that for the time he had labored for said railroad company, during the year next prior to his death, he had been paid one dollar and fifty cents per day; that on the said 11th day of July, A. D. 1868, defendant was, and had been for several years next prior thereto, the owner

of a line of steamboats running on said Mississippi River, between said cities of Dubuque and St. Paul, and intermediate points, of which said line of steamboats the "War Eagle" was one; that at the date aforesaid the freight-warehouse of the railroad company at Prairie du Chien was situated at the steamboat-landing at that point, a dock only intervening between the warehouse and river, alongside which dock defendant's steamboats landed; that on the evening of the said 11th day of July, A. D. 1868, defendant's steamboat "War Eagle," in the course of a voyage from Dubuque to St. Paul, landed alongside the dock fronting the railroad freight-warehouse at Prairie du Chien, made fast, and
50 run out her two stages or gang-planks, side by side, from the forward boiler-deck of said steamboat on to said dock, and that said dock, at the point where said stages were run out, was some three or four feet above said boiler-deck; that when said steamboat landed as aforesaid, she found in waiting for her, and to be taken on board at that time, some fifteen or twenty tons of freight in the said railroad freight-warehouse, which was to be carried on board over said stages as they had been run out; that thereupon the captain of said steamboat directed the mate thereof to employ some men to assist the crew of steamboat in loading said freight from said warehouse on to said boat, and thereupon said mate, at said warehouse, hired the said Patrick McCue, together with five other men, who were laborers for said railroad company in like capacities as the said McCue, to assist the crew of said steamboat in carrying said freight from said warehouse on board said steamboat, and agreed to pay said McCue, and each of said five other men, at the rate of fifty cents an hour for the time they should be engaged in such service; that the said Patrick McCue and said five other men immediately entered upon said service, and worked with the
51 crew of said steamboat in carrying said freight from said warehouse over said stages, and depositing the same on board of said boat, and were engaged in said work for the space of about two and one-half hours; that so soon as the said Patrick McCue, together with said five other men, had deposited their last load of freight on board said boat, and while they were yet on board of said boat, the said mate said to them, "Laboring men, go to the office and get your pay," (meaning the office on board of said boat, and which was on the deck above the boiler-deck, where the men then were, and was reached by a flight of stairs;) that immediately thereupon the said Patrick McCue and said five other men went to the office of said boat and were there immediately paid off in turn for the services they had rendered, and so soon as they received their pay started to go off said boat over said stages; that the said Patrick McCue was the last one of the said men in going off said boat; and while he was yet upon one of said stages going off said boat, the said crew of said steamboat, then employed on board thereof, carelessly and negligently hauled in the stage upon which the said Patrick McCue was walking, whereby the said Patrick McCue, without fault on his part, was thrown against the edge of said
52 dock, and received an injury from the effects of which he died some five days after. It was also proved that Patrick McCue had been employed occasionally on a special service like that on the 11th of July, 1868, but that otherwise he had never been connected with the navigation of the steamers of the company.

And thereupon the counsel for plaintiff called as a witness said plaintiff, Mary McCue, who was duly sworn, and thereupon the counsel for plaintiff asked said witness this question:

"How many children did Patrick McCue leave at the time of his death?"

To which said question defendant's counsel objected as irrelevant, incompetent, and immaterial, which objection the court overruled, and to which ruling and decision of the court defendant's counsel then and there excepted, and thereupon said witness answered:

"Six; the youngest was born after Patrick McCue's death, and was two years old last Christmas, and the oldest is now seventeen."

And thereupon the plaintiff rested.

And thereupon and immediately thereafter defendant's counsel moved the court to instruct the jury to return a verdict for the defendant, for the reason that the plaintiff's intestate at the time of the injury
53 complained of was an employee of defendant, and therefore the plaintiff could not recover.

But the court refused to so instruct said jury, to which said ruling and decision of the court defendant's counsel did then and there except.

And thereupon said defendant, to maintain said issue on its part, gave evidence tending to show that said defendant had no office or place on shore at Prairie du Chien, for paying its servants, laborers, or employees, and that at the time the said Patrick McCue and said five other men were employed as above stated, the only place defendant had for paying them was at the office on board the steamboat War Eagle, and that it was customary and usual for defendant to pay such laborers at the offices on board its steamboats. Also that the said Patrick McCue had occasionally been employed by defendant at Prairie du Chien in like capacities as he was at the time he received the injury complained of, but that this was the first and only time he had been employed by defendant that season.

And thereupon defendant rested.

The above is all the material evidence bearing on the case.

And the testimony being thus closed, the counsel for the defendant requested said court to charge and instruct said jury as follows, viz:

54 "First. If, at the time of the injury, Patrick McCue was an employee of the defendant, and was injured by the carelessness of a co-employee, plaintiff cannot recover in this action.

"Second. If Patrick McCue was employed by the defendant to do certain work, the performance of which required him to go on board the steamboat, and he went on board in pursuance of that employment, such employment would continue until he had a reasonable time to go off, and while he was so going off the boat, after completing his work, and if in so going off he was injured by the carelessness of a co-employee, the plaintiff cannot recover in this action.

"Third. If the employment of Patrick McCue required him to go on board the boat, his going off again when his work was completed was an incident of his employment, and he remained an employee until he reached the shore, provided he went immediately on shore as soon as his work was completed, and if injured while so going off, by the carelessness of a co-employee, the plaintiff cannot recover in this action.

"Fourth. If you believe, from the evidence, that Patrick McCue
55 was hired by the officers of the boat, at the warehouse in Prairie du Chien, to assist in carrying certain freight then in said warehouse, on board the steamboat War Eagle, and that he entered upon said business and worked until all of said freight was on board, and that he and the others engaged with him, being on said boat, were then directed by the mate to go up to the office on said boat and get their pay, and that he did so, and immediately thereafter started

to go off said boat, and in going off the plank was carelessly pulled from under him by the other employees of the boat, whereby he was injured, then we instruct you, that at the time of such injury said McCue was still an employee of said defendant, and plaintiff cannot recover in this action.

"Fifth. It appearing from the evidence that Patrick McCue, plaintiff's intestate, was in the employ of defendant at the time he received the injury complained of in this suit, and that he received such injury through the carelessness and negligence of other employees of said defendant, who were the co-employees of said McCue when he received such injury, we are therefore of the opinion that the plaintiff cannot recover in this suit, and instruct the jury to find for defendant.

56 "Sixth. If you believe, from the evidence, that Patrick McCue was hired by the officers of the boat, at the warehouse in Prairie du Chien, to assist in carrying certain freight then in said warehouse on board the steamboat War Eagle, and that he entered upon said business and worked until all of said freight was on board, and that he and the others engaged with him, being on said boat, were then directed by the mate to go up to the office on said boat and get their pay, and that he did so, and immediately thereafter started to go off said boat, and in going off the plank was carelessly pulled from under him by the other employees of the boat, whereby he was injured, then we instruct you that the plaintiff cannot recover in this action."

And thereupon and thereafter the said court did instruct and charge said jury as follows, viz: But the court declined to give all or any of the instructions in the form as requested by the defendant's counsel, to which the defendant then and there excepted, and of its own motion charged the jury, in substance, as follows:

GENTLEMEN: This is an action brought by Mary McCue, as
57 the administratrix of her husband, Patrick McCue, deceased, on the ground that he was injured by the negligence of the servants of the defendant, on the 11th of July, 1868, which resulted in his death on the 16th of July in the same year; and the question to be determined is whether the defendant is liable for the acts of its servants, which resulted in the death of Patrick McCue, under the circumstances of the case.

There is not much controversy about the material facts in the case. Patrick McCue was a common laboring man, from 45 to 47 years of age at the time of the accident, and had been in the employ of the railroad company, in the warehouse, at Prairie du Chien, in this State. On the 11th of July, 1868, the steamer War Eagle arrived at the landing in Prairie du Chien, in the evening, and being somewhat short-handed, several persons were employed to assist in loading freight that was in the warehouse, on board the boat, and among others Patrick McCue. This employment continued for about two hours and a half, at the end of which time McCue and the rest were requested to go to the office of the boat and receive their pay. They proceeded there accordingly, and were paid, and then started to go ashore. Patrick McCue was
58 going ashore on what is called the gang-plank, and while in the act of proceeding from the boat to the shore, the men on board of the boat pulled in the gang-plank, and McCue was thus thrown down and injured, from which injury he died. It is not disputed but this was an act of carelessness on the part of the men. McCue had been occasionaly employed in this way by defendant's boats, but there does

not seem to be any evidence to show that he was in their general employment, and in this particular year it would appear that this was the first time he had been employed in this way, so that he was employed for a special purpose, which being accomplished, the agreement or contract ceased. The contract was made in the warehouse, the freight was there, the execution of the contract began there, and as soon as the last portion of the freight was carried on board of the boat, the contract terminated, unless, indeed, it continued because he was to be paid off and had the right to go ashore from the boat, and to be provided with the proper means of going ashore, so that in one sense it is true, I suppose, that the contract began on shore, and was terminated by
59 the act of going on shore by McCue. At the same time it may also be said that as soon as he did the last work he was required to do, and was paid off, that he was after that his own master with respect to the contract made between them; that then it was optional with him to do just as he chose.

Therefore, it will be left to the jury to say whether there was the relation of servant and principal or master, as between the deceased Patrick McCue and the defendant, at the time of the injury. And I am not now prepared to say, even if it were true that the relation of servant and master did subsist, that then the action could not be maintained, and I would like to have you find, gentlemen, inasmuch as it may be a material point, and of service hereafter, whether, as a matter of fact, there was or not a termination of the employment between the company and Patrick McCue prior to or at the time of the injury. The counsel for the defendant insists that is a question of law under the conceded facts, that, inasmuch as soon as he was paid off, he immediately proceeded to go on shore, and was in the act of going on shore, that constituted a part of the service, but as the court thinks, for the reason
60 that as soon as paid off, McCue was his own master, and had the entire control and disposition of himself, to remain on board or go ashore, just as he pleased, in one aspect it may be said that the service was terminated. That question, however, the court leaves to the jury, and asks them to find what the fact is, from the evidence, on this point.

Then, gentlemen, leaving the questions of fact to the jury, it will be for the jury to say under the evidence whether the plaintiff has made out *his* case as stated in the declaration. If the service was terminated and this injury was the result of the negligence of the servants of the defendant, then the plaintiff may recover.

The court also instructed the jury in the question of damages, but as no point is made on that, the instructions as to damages are omitted.

The said defendant's counsel then and there, and in the presence of said jury, and before they retired to consider of their verdict, excepted to the following parts and portions of the charge of said court to said jury, to wit:

So much of said charge as was in the words following, viz:
61 "At the same time it may also be said that as soon as he did the last work he was required to do, and was paid off, that he was after that his own master with respect to the contract that was made between them; that then it was optional with him to do just as he chose."

Also to so much of said charge as states: "Therefore it will be left to the jury to say whether there was the relation of servant and princi-

pal or master as between the deceased, Patrick McCue, and the defendant, at the time of the injury."

Also to so much of said charge as states as follows, viz: "And I am not now prepared to say, even if it were true that the relation of servant and master did subsist, that then the action could not be maintained."

Also to so much of said charge as states as follows, viz: "And I would like to have you find, gentlemen, inasmuch as it may be a material point, and of service hereafter, whether, as a matter of fact, there was or not a termination of the employment between the company and Patrick McCue, prior to or at the time of the injury."

Also to so much of said charge as states as follows, viz:

62 "The counsel for the defendant insists that is a question of law under the conceded facts; that, inasmuch as soon as he was paid off, he immediately proceeded to go on shore, and was in the act of going on shore, that constituted a part of the service; but as the court thinks, for the reason that, as soon as paid off, McCue was his own master, and had the entire control and disposition of himself, to remain on board or go ashore, just as he pleased, in one aspect it may be said that the service was terminated. That question, however, the court leaves to the jury, and asks them to find what the fact is from the evidence on this point."

Also to so much of said charge as states as follows, viz: "Then, gentlemen, leaving the questions of fact to the jury, it will be for the jury to say, under the evidence, whether the plaintiff has made out her case as stated in the declaration, or in any one count of the declaration. If the service was terminated, and this injury was the result of the negligence of the servants of the defendant, then the plaintiff may recover."

The jury found a verdict in the following words:

63 "And the jury finds that the contract made between the N. W. Packet Company and Patrick McCue terminated at and by the payment at the clerk's office of the steamer War Eagle, and previous to the injury of Patrick McCue, deceased, and that the plaintiff is entitled to damages, and the jury assess the damages $2,800."

And the verdict was thereupon reduced to proper form, and entered of record as it now appears.

Exceptions allowed.

THOMAS DRUMMOND. [SEAL.]

APRIL 22, 1871.—This day came the defendant's counsel, and filed the bond of Peyton S. Davidson, of La Crosse, and John Lawler, of Prairie du Chien, in the penalty of six thousand dollars conditioned that the defendant shall prosecute a writ of error to effect, and answer all damages and costs if it fail to make its plea good, which bond is approved by the court, and is as follows:

Bond for supersedeas.

Circuit court of the United States, eastern district of Wisconsin.

MARY MCCUE, ADMINISTRATRIX OF THE ESTATE of Patrick McCue, deceased,
vs.
THE NORTHWESTERN UNION PACKET COMPANY.

Know all men by these presents, that we, Peyton S. Davidson, of the city and county of La Crosse, in the State of Wisconsin, and John

Lawler, of Prairie du Chien, in the county of Crawford, in said State, are held and firmly bound unto the above-named Mary McCue, administratrix of the estate of Patrick McCue, deceased, in the sum of six thousand dollars to be paid to the said Mary McCue, administratrix of the estate of Patrick McCue, deceased, her heirs, executors, administrators, successors, or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated the twentieth day of April, A. D. 1871.

Whereas the above-named defendant, The Northwestern Union Packet Company, has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered against said defendant in the above-entitled suit by the circuit court of the United States for the eastern district of Wisconsin.

Now, therefore, the condition of this obligation is such that if the above-named defendant, The Northwestern Union Packet Company, shall prosecute its said writ of error to effect, and answer all damages and costs if it fail to make its plea good, then this obligation shall be void;
65 otherwise the same shall be and remain in full force and virtue.

P. S. DAVIDSON. [SEAL.]
J. LAWLER. [SEAL.]

Sealed and delivered in presence of—
N. MCCORTNY.

STATE OF WISCONSIN, *County of Milwaukee, ss:*

Peyton S. Davidson, being duly sworn, deposes and says that he is one of the sureties named in, and who signed the above bond; that he is a resident and freeholder within the city of La Crosse, in the county of La Crosse, and State of Wisconsin, and that he is worth the sum of six thousand dollars over and above all his debts, liabilities, and exemptions.

P. S. DAVIDSON.

Sworn to before me this 20th day of April, 1871.
[SEAL.] ALFRED L. CARY,
Notary Public, Milwaukee Co., Wis.

STATE OF WISCONSIN, *County of Crawford, ss:*

John Lawler, being duly sworn, deposes and says that he is one of the sureties named in, and who signed the above bond; that he is a resident and freeholder within the village of Prairie du Chien, in the county of Crawford, and State of Wisconsin, and that he is worth
66 the sum of six thousand dollars over and above all his debts, liabilities, and exemptions.

J. LAWLER.

Sworn to before me this 21 day of April, 1871.
[SEAL.] JAC. RAFFAUF,
Not'y Public, Crawford Co., Wisc.

Approval.

(Endorsed:) April 22, 1871. This bond is approved, and supersedeas ordered.

By the court.

A. G. MILLER,
District Judge.

Order for supersedeas.

Whereupon it is ordered that execution be superseded, and thereupon a writ of error and citation issued, and a copy of said writ of error lodged for defendant in error.

67 UNITED STATES OF AMERICA,
Eastern District of Wisconsin, ss:

I, Edward Kurtz, clerk of the circuit court of the United States of America for the eastern district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcripts therefrom now on file, and remaining of record in my office, being a full and complete copy of the record and proceedings in the case of Mary McCue, administratrix of the estate of Patrick McCue, deceased, vs. The Northwestern Union Packet Company.

In testimony whereof I have hereunto set my hand, and duly affixed the seal of the said court at the city of Milwaukee, in said eastern district of Wisconsin, this fifth day of December, in the year of our Lord one thousand eight hundred and seventy-one, and of the Independence of the said United States the ninety-sixth.

[SEAL.] EDWARD KURTZ, *Clerk.*

68 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the judges of the circuit court of the United States of America for the eastern district of Wisconsin, greeting:

Because, in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said circuit court of the United States of America for the eastern district of Wisconsin, before you, between Mary McCue, administratrix of the estate of Patrick McCue, deceased, plaintiff, and The Northwestern Union Packet Company, defendant, a manifest error hath happened, to the great damage of the said The Northwestern Union Packet Company, as by the complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, that of right and according to law and custom of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this twenty-second day of April, in the year of our Lord one thousand eight hundred and seventy-one, and of the independence of the United States the ninety-fifth.

EDWARD KURTZ,
Clerk U. S. Circuit Court East'n Dist. Wis.

(Indorsed:) Filed April 22, 1871. E. Kurtz, clerk.

69 The United States of America to Mary McCue, administratrix of the estate of Patrick McCue, deceased, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first

Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States of America for the eastern district of Wisconsin, wherein The Northwestern Union Packet Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this twenty-second day of April, in the year of our Lord one thousand eight hundred and seventy-one, and of our independence the 95th.

[SEAL.] A. G. MILLER,
District Judge.

We accept service of above citation this first day of June, A. D. 1871.
DUTCHER & WEBSTER, &
G. C. HAZELTON,
Pl'ff's Att'ys,
By GEO. W. LAKIN.

(Indorsement on cover:) No. 521. The Northwestern Union Packet Company, plaintiff in error, vs. Mary McCue, adm'x of the estate of Patrick McCue, dec'd. E. Wisconsin. C. C. U. S. Filed 11th December, 1871.

Supreme Court, United States.

THE NORTHWESTERN UNION PACKET CO.,

Plaintiff in Error,

against

MARY McCUE, Administratrix of the Estate of Patrick McCue, Deceased.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE EASTERN DISTRICT OF WISCONSIN.

No. 71, October Term, A. D. 1873.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN W. CARY,
Of Counsel for Plaintiff in Error.

Supreme Court, United States.

THE NORTHWESTERN UNION PACKET COMPANY,
Plaintiff in Error.

vs.

MARY McCUE, Administratrix of the estate of Patrick McCue, deceased.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE EASTERN DISTRICT OF WISCONSIN.

No. 71, *October Term, A. D.* 1873.

This suit was commenced by the defendant in error, against the plaintiff in error, in the Circuit Court, in and for the county of Crawford, State of Wisconsin, on the 23d day of October, 1868, and was afterwards, and on or about the 9th day of June, 1869, removed to the Circuit Court of the United States for the then District of Wisconsin, on the application of said plaintiff in error.

On the 20th day of August, 1869, the defendant in error filed her declaration (found on pp. 9, 10, 11 and 12 of printed record) to which the plaintiff in error filed its demurrer September 13th, 1869. (See record p. 12.) At the September term, 1869, this demurrer was overruled by the court, and leave granted to the plaintiff in error to file its plea, which it did November 4th, 1869, filing a plea of not guilty. (Record p. 13.)

At the October Term, A. D. 1870, of the court, the issue thus joined came on to be tried before the court and a jury, on which trial the jury returned a verdict for the defendant in error and assessed her damages at the sum of four thousand dollars. (Record p. 14.) At the same term, the plaintiff in error filed a motion to set aside this verdict, and for a new trial, which motion was granted by the court November 5th, 1870, and at the same time granted leave to the defendant in error to amend her declaration. (Record pp. 14 and 15.)

On the 10th day of November, 1870, defendant in error amended her declaration by adding thereto a second count. (Record pp. 15, 16, 17 and 18.)

At the April Term, A. D. 1871, of the court, a second trial of this cause was had, at which time the parties by their counsel consented that the plea of the plaintiff in error, filed Nov. 4th, 1869, should stand as its plea to the declaration as amended (Record p. 19). Upon this trial the jury returned a verdict for the defendant in error and assessed her damages at the sum of two thousand eight hundred dollars (Record p. 20). At the same term the plaintiff in error filed a motion to set aside this verdict and for a new trial, which motion was denied by the court April 20th, 1871, and thereupon judgment was entered in favor of the defendant in error and against the plaintiff in error for the sum of two thousand eight hundred dollars damages and eighty-seven dollars and thirty cents costs (Record p. 20).

The writ of error herein was sued out upon this judgment.

This action is based upon the authority given by sections 12 and 13, chapter 135, Revised Statutes of Wisconsin for 1858, which are as follows:

SECTION 12. Whenever the death of a person shall be caused by a wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who, or the corporation which would have heen liable, if death had not

ensued, shall be liable to an action for damages, notwithstanding the death of the person injured: Provided, that such action shall be brought for a death caused in this State, and in some court established by the constitution and laws of the same.

SECTION 13. Every such action shall be brought by and in the name of the personal representative of such deceased person; and the amount recovered shall belong and be paid over to the husband or widow of such deceased person, if such relative survive him or her; but no husband or widow survive the deceased, the amount recovered shall be paid over to his or her lineal descendants, and to his or her lineal ancestors in default of such descendants; and in every such action the jury may give such damages, not exceeding five thousand dollars, as they shall deem fair and just in reference to the pecuniary injury resulting from such death, to the relatives of the deceased specified in this section: Provided, every such action shall be commenced within two years after the death of such deceased person.

STATEMENT OF FACTS.

The steamboat called the War Eagle was, on the 11th day of July, A. D. 1868, owned by plaintiff in error, and at that time was used by it in carrying freight and passengers upon the Mississippi River, from the City of Dubuque, in the State of Iowa, to the city of St Paul, in the State of Minnesota, and intermediate points; that on the said 11th day of July, 1868, Patrick McCue, the intestate of defendant in error, and at and for several years next prior to his death her husband, resided and had so resided for some eight years next prior to said date at the village of Prairie du Chien, in the State of Wisconsin, a point on said Mississippi River, intermediate said cities of Dubuque and St. Paul; that on said 11th day of July, 1868,

the said Patrick McCue was and had been, during nearly all the time he had so resided at Prairie du Chien, employed by the railroad company, whose railroad terminates at said Prairie du Chien, as a common laborer in and about the depot and freight warehouse of said railroad Company, at Prairie du Chien, and that his hours of labor for said railroad Company generally commenced about six o'clock in the morning and terminated about six o'clock in the evening, and that for the time he had labored for said railroad Company, during the year next prior to his death, he had been paid one dollar and fifty cents per day; that on the said 11th day of July, 1868, plaintiff in error was, and had been for several years next prior thereto, the owner of a line of steamboats running on said Mississippi River, between said cities of Dubuque and St. Paul and intermediate points, of which said line of steamboats the War Eagle was one; that at the date aforesaid the freight warehouse of the railroad company at Prairie du Chien, was situated at the steamboat landing at that point, a dock only intervening between the warehouse and river, alongside which dock the steamboats of plaintiff in error landed; that on the evening of the said 11th day of July, 1868, the War Eagle, in the course of a voyage from Dubuque to St. Paul, landed alongside the dock fronting the railroad freight warehouse at Prairie du Chien, made fast, and run out her two stages or gang planks, side by side, from the forward boiler deck of said steamboat on to said dock, and that said dock, at the point where said stages were run out, was some three or four feet above said boiler deck; that when said Steamboat landed as aforesaid, she found in waiting for her, and to be taken on board at that time, some fifteen or twenty tons of freight in the said railroad freight warehouse, which was to be carried on board over said stages as they had been run out; that thereupon the captain of said steamboat directed the mate thereof to employ some men to assist the crew of said steamboat in loading said freight from said warehouse on to said boat, and thereupon said mate, *at*

said warehouse, hired the said Patrick McCue, together with five other men who were laborers for said railroad company in like capacities as the said McCue, to assist the crew of said steamboat in carrying said freight from said warehouse on board said steamboat, and agreed to pay said McCue, and each of said five other men, at the rate of fifty cents an hour for the time they should be engaged in such service; that the said Patrick McCue and said five other men immediately entered upon said service, *and worked with the crew of said steamboat in carrying said freight from said warehouse over said stages, and depositing the same on board of said boat;* and were engaged in said work for the space of about two and one-half hours; *that so soon as the said Patrick McCue, together with said five other men, had deposited their last load of freight on board of said boat, and while they were yet on board of said boat, the said mate said to them.* "LABORING MEN, GO TO THE OFFICE AND GET YOUR PAY;" (meaning, the office on board of said boat, and which was on the deck above the boiler deck, where the men then were, and was reached by a flight of stairs;) *that immediately the said Patrick McCue and said five other men went to the office of said boat and were there immediately paid off in turn for the services they had rendered, and as soon as they received their pay started to go off said boat over said stages;* that the said Patrick McCue, was the last one of the said men in going off said boat; and while he was yet upon one of said stages going off said boat, the said crew of said steamboat, then employed on board thereof, carelessly and negligently hauled in the stage upon which said Patrick McCue was walking whereby the said Patrick McCue, without fault on his part, was thrown against the edge of said dock, and received an injury from the effects of which he died some five days after; that he had been employed occasionally on a special service like that on the 11th day of July, 1868, but that otherwise he had never been connected with the navigation of the steamers of the company; *that said plaintiff in error had no office or place on*

shore at Prairie du Chien, for paying its servants, laborers or employees, and that at the time the said Patrick McCue and said five other men were employed as above stated, the only place defendant had for paying them, was at the office on board the steamboat War Eagle, and that it was customary and usual for defendant to pay such laborers at the offices on board its steamboats; that the said Patrick McCue had occasionally been employed by the said plaintiff in error at Prairie du Chien, in like capacities as he was at the time he received the injury complained of, but that this was the first and only time he had been employed by said plaintiff in error that season. (Record pp. 21, 22 and 23.)

ASSIGNMENT OF ERRORS.

First. The Court erred in admitting the following evidence. The defendant in error testified as follows:

Question. "How many children did Patrick McCue have at the time of his death?"

Objected to by counsel for plaintiff in error; overruled and exception taken.

Answer. "Six: the youngest was born after Patrick McCue's death, and was two years old last Christmas, and the oldest is now seventeen." (Record pp. 22 and 23.)

Second. The court erred in refusing to give the jury the first, second, third, fourth, fifth and sixth instructions requested by counsel for plaintiff in error, and which were as follows:

"*First.* If, at the time of the injury, Patrick McCue was an employee of the defendant, and was injured by the carelessness of a co-employee, plaintiff cannot recover in this action."

"*Second.* If Patrick McCue was employed by the defendant to do certain work, the performance of which required him to go on board the steamboat, and he went on board in pursuance of that employment, such employment would continue until he had a reasonable time to go off, and while he was so going off

the boat after completing his work, and if in so going off he was injured by the carelessness of a co-employee, the plaintiff cannot recover in this action."

"*Third.* If the employment of Patrick McCue required him to go on board the boat, his going off again when his work was completed was an incident of his employment, and he remained an employee until he reached the shore, provided he went immediately on shore as soon as his work was completed, and if injured while so going off by the carelessness of a co-employee, the plaintiff cannot recover in this action."

"*Fourth.* If you believe from the evidence that Patrick McCue was hired by the officers of the boat, at the warehouse in Prairie du Chien, to assist in carrying certain freight then in said warehouse, on board the steamboat War Eagle, and that he entered upon said business and worked until all of said freight was on board, and that he and the others engaged with him, being on said boat, were then directed by the mate to go up to the office on said boat and get their pay, and that he did so, and immediately thereafter started to go off said boat, and in going off, the plank was carelessly pulled from under him by the other employees of the boat, whereby he was injured, then we instruct you that at the time of such injury said McCue was still an employee of said defendant, and plaintiff cannot recover in this action."

"*Fifth.* It appearing from the evidence that Patrick McCue, plaintiff's intestate, was in the employ of defendant at the time he received the injury complained of in this suit, and that he received such injury through the carelessness and negligence of other employees of said defendant, who weret he co-employees of said McCue when he received such injury, we are, therefore, of the opinion that the plaintiff cannot recover in this suit, and instruct the jury to find for defendant."

"*Sixth.* If you believe, from the evidence, that Patrick McCue was hired by the officers of the boat, at the warehouse in Prairie du Chien, to assist in carrying certain freight, then in

said warehouse, on board the steamboat War Eagle and that he entered upon said business and worked until all of said freight was on board, and that he and the others engaged with him, being on said boat, were then directed by the mate to go up to the office on said boat and get their pay, and that he did so, and immediately thereafter started to go off said boat, and in going off, the plank was carelessly pulled from under him by the other employees of the boat, whereby he was injured, then we instruct you that the plaintiff cannot recover in this action." (Record pp. 23 and 24.)

Counsel for plaintiff in error excepted to the refusal of the court to give the above instructions as requested. (Record p. 24.)

Third. The court erred in instructing the jury as follows: "At the same time it may also be said that as soon as he did the last work he was required to do, and was paid off, that he was after that his own master with respect to the contract that was made between them; that then it was optional with him to do just as he chose."

Also as follows: "Therefore it will be left to the jury to say whether there was the relation of servant and principal or master as between the deceased, Patrick McCue, and the defendant at the time of the injury."

Also as follows: "And I am not now prepared to say, even if it were true, that the relation of servant and master did subsist, that then the action could not be maintained."

Also as follows: "And I would like to have you find, gentlemen, inasmuch as it may be a material point, and of service hereafter, whether, as a matter of fact, there was or not a termination of the employment between the company and Patrick McCue, prior to or at the time of the injury."

Also as follows: "The counsel for the defendant insists that it as a question of law under the conceded facts, that inasmuch as soon as he was paid off he immediately proceeded to go on shore, and was in the act of going on shore, that constituted a

part of the service; but as the court thinks, for the reason that as soon as paid off, McCue was his own master and had the entire control and disposition of himself, to remain on board or go ashore, just as he pleased. In one aspect it may be said that the service was terminated. That question, however, the court leaves to the jury, and asks them to find what the fact is from the evidence on this point."

And also as follows: "Then, gentlemen, leaving the questions of fact to the jury, it will be for the jury to say, under the evidence, whether the plaintiff has made out her case as stated in the declaration, or in any one count of the declaration. If the service was terminated, and this injury was the result of the negligence of the servants of the defendant, then the plaintiff may recover." (Record pp. 24 and 25.)

Counsel for plaintiff in error excepted to each and every of said instructions. (Record pp. 25 and 26.)

POINTS AND ARGUMENT.

1. A master is not responsible to those in his employ for injuries resulting from the negligence, carelessness or misconduct of a fellow servant engaged in the same general business. This we understand to be the universal rule adopted by all the courts of this country and in England.

Moseley vs. Chamberlain, 18 Wis., 700.

Cooper vs. Milwaukee and Prairie du Chien Railway Co., 23 Wis., 669.

Wright vs. New York Central Railroad Co., 25 N. Y. 562.

Farwell vs. The Boston and Worcester R. R. Corp., 4 Met., 49.

Brown vs. Maxwell, 6 Hill, 592.

Coon vs. Syracuse and Utica R. R. Co., 1 Seld., 492.

Sherman vs. Rochester and Syracuse R. R Co., 17 N. Y., 153.

Russell vs. Hudson R. R. Co., 17 N. Y. 134.

Boldt vs. N. Y. Central R. R. Co., 18 N. Y. 432.

Hayes vs. The Western R. R. Corp., 3 Cush., 270.

Albro vs. The Agawam Canal Co., 6 Cush. 75.

Ray vs. Boston and Worcester R. R. Corp., 9 Cush., 112.

Gillshanon vs. The Stony Brook R. R. Corp. 10 Cush. 228.

Priestly vs. Fowler, 3 Mees. & Wels. 1.

Hutchinson vs. The York &c. Railway Co. 5 Exch. R. 343.

Horner vs. Illinois Central Railroad Co., 15 Ill., 550.

Illinois Central Railroad Co., vs. Cox. 21 Ill., 20.

We might cite numerous other cases from the courts of almost every state in the Union to the same effect, and have cited the great number we have to show the universality of the rule.

One strong reason for the rule is this, that the servant in contracting with the master for the employment assumes all the risks incident to the employment, including the negligent, careless and wrongful acts of his fellow servants.

2. The rule exempting the master is the same, although the grades of the servants or employees are different, and the person injured is inferior in rank and subject to the directions and general control of him by whose act the injury is caused.

Hayes vs. The Western R. R. Corp., 3 Cush. 270.

Albro vs. The Agawam Canal Co., 6 Cush. 75.

Wright vs. N. Y. Central Railroad Co., 25 N. Y. 562.

Wyman vs. Jay, 5 Exch., 352.

3. Neither is it necessary, in order to bring a case within the general rule of exemption, that the servants, the one that suffers and the one that causes the injury, should be at the time engaged in the same operation or particular work. It is enough

that they are in the employment of the same master, engaged in the same common enterprise, both employed to perform duties and services tending to accomplish the same general purposes.

Wright vs. New York Central Railroad Co., 25 N. Y. 562.
Boldt vs. New York Central R. R. Co., 18 N. Y. 432.
Coon vs Syracuse & Utica R. R. Co., 1 Selden 492.
Farwell vs. Boston & Worcester R. R. Corp. 4 Met. 49.
Albro vs. The Agawam Canal Co., 6 Cush. 75.
Gillshanon vs. Stony Brook R R. Corp. 10 Cush. 228.
Wyman vs. Jay, 5 Exch. 352.
Hutchinson vs. York, &c. R. Co., 5 Exch. 343.
Illinois Central Railroad Co. vs. Cox, 21 Ill. 20.

II.

Applying the above rule to this case the plaintiff in error was not liable for the injuries received by Patrick McCue, the intestate of the defendant in error, and which it is claimed resulted in his death.

1st. At the time he received the alleged injuries he was a servant or employee of the plaintiff in error. The mate of the War Eagle employed Patrick McCue together with five other laboring men, *at the railroad freight warehouse on the dock or shore*, to assist the crew of the steamboat in carrying freight from said warehouse upon said boat. The contract of employment was made on the shore, and it will be remembered in this connection that the said Patrick resided at Prairie du Chien, that he was regularly employed during the day by the Railroad Company, whose road terminated at that place, and that the boat was to leave on its trip as soon as the loading

was completed, and it must be presumed from the facts that it was his intention and the intention of the mate who hired him to assist in loading the War Eagle, that he should return to the shore from the boat as soon as he should have carried his last load of freight from the warehouse and deposited the same on the boat, and therefore his employment by the mate covered his final return to the shore. His relation of employee continued until he had finally left the boat ; if not, what relation did he sustain to the owner of the boat while finally leaving it ? He was not a passenger, he was not a trespasser, for his employment carried him on the boat, and having lawfully entered upon the boat as a servant, and being required to leave it at the end of the service, he would still be a servant until he had finally quit the boat. One of the risks which he assumed in entering upon this employment, was his passage over the stages or gang planks in going to and from the boat in loading the freight, and can it be said that he did not as well assume this risk in finally leaving the boat, as at any other time that he passed over these planks in the course of his employment. Those in charge of the boat were in duty bound to permit McCue to go ashore after he had finished carrying freight and were also bound to furnish him with the means of going ashore, and he was likewise bound by the contract which he had made to go ashore. He certainly could not have remained on the boat under the contract which he had made. To have entitled him to remain he would have been obliged to make some other contract. The fact that he was paid for his services at the office on the steamboat, did not change his relations to the boat, he was still a servant until he finally reached the dock or shore. The plaintiff in error had no office or place on shore where it could make payment, and its only place for paying for services of this kind was at its office on the boat. McCue knew this, as he had occasionally before this been employed by plaintiff in error in a similar way. (Record p. 23.) Upon the point that he still sustained the relation of a servant while leaving the boat when he received his injuries, we cite the following cases :

Ryan vs. the Cumberland Valley Railroad Co., 23 Penn. State, 384.

Gillshannon vs. Stony Brook Railroad Corp. 10 Cush. 228.

Russell vs. Hudson R. R. Co., 17 N. Y. 134.

Seaver vs. Boston & Maine Railroad, 14 Gray, 466.

Tunney vs. Midland Railway Co., 12 Jur. N. S. 691.

2. McCue was injured solely through the carelessnes and negligence of his fellow servants. It was the crew of the War Eagle who hauled in the stage upon which McCue was walking ashore, and by which he was thrown against the edge of the dock and injured. He was employed to and did assist this same crew in carrying freight from the warehouse to and upon the boat. (Record p. 22.) He and the crew were in the same grade of employment, and in fact, in the same service. His employment carried him over these stages or gang planks, in passing to and from the boat to the warehouse, and in contracting for this service, he assumed all risks incident thereto, and especially the risks pertaining to these stages or gang planks, and the manner in which they should be handled by the crew, his fellow servants. The fact that his term of service was of short duration, only two and one-half hours, can make no difference in the application of the rule exempting the master from liability. McCue was paid fifty cents an hour for the service, an extra price for a common laboring man. The facts of the case show that he was receiving from the Railroad Company one dollar and fifty cents per day for working from six o'clock in the morning until six o'clock in the evening. (Record p. 21.) Fifty cents an hour for the transient service which he performed in assisting to load the War Eagle, was a large price, and commensurate with all the risks incident to the service.

III.

The instructions which the plaintiff in error requested the Court below to give to the jury, and which appear in our sec-

ond assignment of errors, were all based upon the rule of law above stated and were an application of that rule to the facts of the case.

We do not deem it necessary to call the attention of the Court to each one of these instructions and show wherein the Court erred in refusing them, for if we are correct in our propositions already stated, then the error in refusing these instructions will be patent from simply reading them. The second, third and fourth instructions were framed and requested with this view, that it was the duty of the Court to determine as a matter of law upon the conceded facts of the case whether or not McCue was an employee of the plaintiff in error at the time he was injured, and of this we shall speak in our next point.

IV.

As will appear from the charge of the court to the jury and contained in our third assignment of errors the court Charged as follows: "and I am not now prepared to say, even if it were true that the relation of servant and master did subsist that the action could not be maintained." This was clearly an error, being in contravention of the rule of law which we have already stated.

2. The Court in its charge to the jury left it to them to determine as a question of fact whether or not McCue, at the time he was injured, was an employee of the plaintiff in error, whether there was or not a termination of the employment between the company and Patrick McCue, prior to or at the time of the injury. (See charge, Record pp. 24 and 25 and also see our third assignment of errors.)

This was clearly an error. It was purely a question of law to be determined by the Court. The facts were all conceded

and undisputed. It was conceded that McCue was hired by the mate on shore to assist the crew in carrying freight from the warehouse to and upon the boat over the stages and that he did so assist; that as soon as he deposited his last load of freight on the boat, he was directed to go to the office on the boat and get his pay; that he went and got his pay and immediately thereafter started to leave the boat by passing over the stages, and that while he was upon one of the stages passing to the shore, the stage was hauled in by the crew and he was thrown against the dock and injured. It was further an undisputed fact that the plaintiff in error had no office or place on shore for paying its servants or laborers, and that the only place for paying them was at the office on the boat. All the facts in the case were conceded or undisputed. Now, we say that it was the duty of the court to determine as a question of law, upon the conceded and undisputed facts, what the relation was existing between the plaintiff in error and McCue at the time he was injured, and it was error for the court to leave this question to be determined by the jury.

Parks vs. Ross, 11 How. U. S. 362. See 372.
Benson vs. Southard, 10 N. Y. 236. See 240.
Storey vs. Brennan, 15 N. Y. 524. See 526.
People vs. Cook, 4 Selden, 67.

JOHN W. CARY
Of Counsel for Plaintiff in Error.

Supreme Court of United States.

TERM 1873.

THE NORTHWESTERN UNION PACKET COMPANY, PLAINTIFF IN ERROR,

vs.

MARY McCUE, ADMINISTRATRIX OF THE ESTATE OF PATRICK McCUE, DISCEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

DUTCHER & WEBSTER, &
G. C. HAZELTON
Attorneys for Defendant in error.

GEO. W. LAKIN of Counsel.

Matt. H. Carpenter
of Counsel for
Dfft. in Error

Supreme Court of the United States,

TERM 1873.

THE NORTHWESTERN UNION PACKET COMPANY, PLAINTIFF IN ERROR,

vs.

MARY McCUE, ADMINISTRATRIX OF THE ESTATE OF PATRICK McCUE, DISCEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

This action was brought by Mary McCue as Administratrix of the estate of Patrick McCue to recover damages for injuries done to the person of the said Patrick McCue, her husband, resulting in the death of the said Patrick McCue, by the plaintiff in error, through its agents and servants engaged in running and operating the steamboat War Eagle, a steamboat belonging to the plaintiff in error, committed at Prairie du Chien, Wisconsin. The material facts in the case appear in the evidence contained in the bill of exceptions on page 21, 22 and 23 of the printed case or transcript of the Record herein, to which the defendant in error respectfully refers.

The material matters alleged by the defendant in error in her declaration herein are as follows:—That the plaintiff in error before and at the time of said injuries was the owner of a line of steamboats plying on the Mississippi River between Dubuque and Saint Paul and intermediate points, one of which boats was named the "War Eagle."

That on or about July 11th, 1868, said steamboat "War Eagle," in the course of its business as one of the said line, landed at said Prairie du Chien, Wisconsin, for the purpose of landing and receiving passengers, and unloading and receiving freight.

That while said steamboat was so lying at the landing at said Prairie du Chien, its officers, then in the employ of said plaintiff in error on board said boat, employed said Patrick McCue for a short space of time to assist in carrying on and off said boat the freight which they were there discharging and receiving, and that he worked under said employment for the space of one hour.

That said Patrick McCue was not otherwise in the employment of the plaintiff in error, and was not in the employ of the plaintiff in error at the time of receiving said injuries, but that after his term of service had expired and he had completed the work assigned him, he was ordered by the plaintiff in error to go up to the clerk's office on board said boat and get his pay, which he did.

That said Patrick McCue was not in the employ of plaintiff in error after completing said work or after receiving his pay therefor, and that the work was done and pay received before the injuries complained of were committed and received.

That after said Patrick McCue had so received his pay he immediately hastened to and attempted to go ashore from said boat, but that while he was on the gangway plank, which was run out from said boat for the passing and re-passing of persons going on board or ashore, the officers and employees having the care and management of said boat for the plaintiff in error, carelessly, negligently, unnecessarily, and recklessly and without his fault, pulled in said gangway plank out from under his feet by means of which he was thrown with great force upon the edge of the wharf, barge and timbers, and so injured thereby as to cause his death, by means of which the defendant in error was damaged in the sum of five thousand dollars.

The plaintiff in error plead the general issue to the foregoing.

Two trials were had in the United States Circuit Court for the Eastern District of Wisconsin, in the first trial the defendant in error obtained a verdict for the sum of $4,000. A new trial was granted on the application of the plaintiff in error and on such new trial the defendant in error obtained a verdict for $2,800. Application was again made for a new trial by the plaintiff in error, which application was denied, and judgment was rendered on the verdict, from which judgment the plaintiff in error appealed to this Court.

The errors assigned by the plaintiff in error are embodied in the bill of exceptions on pages 22, 23, 24, 25 and 26 of the said printed case or transcript of the record herein.

The points relied upon by the plaintiff in error appear to be substantially as follows:—

1st That the Court erred in admitting the answer to the question "How many children did Patrick McCue leave at the time of his death?" (pages 22 and 23 of printed case.)

2d That the said Patrick McCue, deceased, was an employee of the plaintiff in error at the time of receiving the injuries which caused his death, and therefore the defendant in error was not entitled to recover.

3d. That whether or not he was such employee is a question of law for the Court, and that therefore the Court erred in submitting said question to the jury as a question of fact.

We, in behalf of the defendant in error, respectfully submit the following propositions with our argument based thereon, and a reference to the authorities upon which we rely, to all of which we respectfully ask the attention and consideration of the Court.

1st proposition. We claim that the Court did not err in admitting evidence of the number of children left by the deceased

2d. We claim that at the the time of the injuries to said Patrick McCue which caused his death, he was not in the employ of the plaintiff in error, but his character as an employee or servant of said plaintiff in error ceased immediately upon the completion of the work he was employed to perform or upon his receiving his pay therefor, all of which was before the said injuries were received.

3d. We claim further that admitting that said employment did not end

until the said Patrick McCue had reached the shore, still the defendant in error was entitled to recover for two reasons.

1st reason. That one employee can recover of the principal or employer damages for injuries to his person resulting from the negligence of a co-employee.

2d reason. Even if the preceding reason should be decided in the negative, we claim that the said Patrick McCue was employed in and about a special and not a general service, and therefore was not an employee engaged in the same general business with the persons by whom, or through whose negligence he was injured, and therefore admitting that the current of authorities is in favor of a negative answer to the preceding reason, still the maxim *stare decisis* will not apply here, because the service in which he was employed does not come within the meaning spirit or language of any of the said decisions.

4th propositions. We claim that the question whether the deceased was or not an employee at the time of the injuries, is a question of fact for the jury, and the Court did not err in submitting it to them as such, and

5th and lastly. That the second proposition laid down by us must necessarily be answered in the affirmative, and hence the error of submitting said question to the jury, if an error at all, is without prejudice to the plaintiff in error.

1st. The Court properly admitted evidence of the number of children left by deceased. This action was originally instituted in the State Court, to-wit: The Circuit Court of Crawford County, Wisconsin, and was removed by the plaintiff in error to the Circuit Court of the United States. The action was brought upon a statute of the State of Wisconsin which provides that whenever the death of a person shall be caused by a wrongful act, neglect, or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damage in respect thereof, then and in every such case the person who or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured: *provided*, that such action shall be brought for a death caused in this State, and in some Court established by the constitution and laws of the same.

It further provides that the action shall be brought by and in the name of the personal representative of the deceased, and the amount recovered shall belong and be paid over to the husband or widow of the deceased, if such relative survive, if not, then it shall be paid over to the linial decendants, or in default of them, to the linial ancesters; and in every such action the jury may give such damages, not exceeding five thousand dollars, as they shall deem fair and just in reference to the pecuniary injury resulting from such death to the relatives of the deceased specified in the section of the statute referred to. See Revised Statutes of Wisconsin, 1858, Chapter 135, Sections 12 and 13.

We deem it unnecessary to do more than refer to the statute in support of our first proposition, for it must surely be both competent and relevant, in view of the statute, the measure of damage, and the pecuniary injury sustained by the relatives of the deceased mentioned in the statute, and the fact that the personal representative of the deceased, who brought the action, may die during its pendency and before its determination, to inquire as to the number of such relatives, who they are, and what relation they sustain to the deceased.

2d. The deceased was not in the employ of the plaintiff in error at the time of receiving the injuries which caused his death, but his character as an employee or servant had ceased.

The testimony (see pages 21 and 22 of the printed case or transcript of the record herein) shows that the deceased was a regular employee of the railroad company at Prairie du Chien, and was in its employ at the time of receiving said injuries, but that his hours of service were usually from six o'clock in the morning until six o'clock in the evening. That on the evening of the 11th day of July, 1868, his hours of service for the railroad company having ended for the day, the deceased, with several others, hired themselves to the officers of the said steamboat "War Eagle," belonging to and being run by the plaintiff in error, to carry certain freight from the warehouse at Prairie du Chien on to and aboard of said boat, at the rate of fifty cents an hour for the time they should be engaged in such service; that they were engaged in said service two and one half hours. That when the said work was completed they were ordered by the mate to go to the office, which was up the stairs from the lower deck of said boat, and get their pay. That they did so, and after having received their pay, immediately started to go ashore over the stages run out by the boat to pass and repass people to and from the shore, in doing which the deceased was injured so as to cause his death, by and through the carelessness and negligence of the crew of said steamboat, who were then employed on board said boat, in hauling in the stage upon which deceased was passing to the shore, and without any fault on his part, throwing deceased against the edge of the dock, which injured him so that he shortly afterwards died.

It will thus be seen that at the time deceased was so injured the service in and about which he was employed had ended and he had received his pay therefor. All liability on his part as an employee had ceased, all responsibility upon the part of the boat to deceased was ended, except to permit him to pass to the shore in safety, and the deceased occupied the same position that any person, rightfully aboard of said boat as a passenger or on business, occupied. In the name of reason, when does an employment cease, if not when the party has completed the work assigned him and which he was employed to do and receives his pay therefor. Any other rule is so indefinite and uncertain that to establish any other would give rise to endless disputes. Take that as the rule and you have one which is fixed, definite and certain. Seek to establish any other and you enter upon a controversy which has no definite bounds. If the rule we contend for is not the proper one, where shall the line of distinction be drawn in the case before us? In other words, the exact geographical line, on one side of which the person is a servant but by stepping over it he ceases to be one? Will it be at the edge of the boat, a line drawn midway of the gangway plank between the boat and the shore, the shore itself, or a line out of reach of receiving any possible injury from the boat or crew? All this shows the futility of adopting any such rule. It would make the mere act of the party, his locomotion, or moving from one locality to another solve the question as to the position occupied by the deceased at the time of the injury, instead of the contract between the two parties and their acts done and rights and liabilities incurred under it Suppose the deceased had remained on board the boat and went off with it up or down the river? Would it still be contended that he was still a servant so long as he remained aboard, when his labor was all performed, and his pay for it in his pocket? or would they not have regarded him as a mere passenger and have compelled him to pay his fare in the same manner as others? And suppose further that he was injured in endeavoring to get off at the next landing above or below Prairie du Chien, would the defense be set up that he was still a servant? We think it could

with the same propriety be claimed in such supposed case that the party was still a servant, as in this case, if his being aboard or ashore is to be the criterion which is to determine the question, instead of the termination of the labor agreed to be performed under the contract. The length of time elapsed could not affect the question. It seems to us absurd to suppose that the deceased was still a servant of the plaintiff in error after his work was terminated and he was paid therefor, and yet the plaintiff in error, or its officers aboard said boat, no power to control his actions in any way, to say to him to do this or that. If this theory of a geographical line, which is certainly a new theory in the construction of contracts and determining terms of service is to obtain, then it is an advertisement to officers and crews of our Mississippi steamboats, who are known to be regardless and reckless of human life, especially the lives of laborers, that there is a certain line on one side of which they may be as reckless as they please of the lives of those who have been employees of the company and are going ashore after their employment has ceased, and that if they can ascertain exactly where this line runs, they may murder them on that side of it with perfect impunity.

3d. Admitting for sake of argument that the employment had not ended at the time of injury, still, plaintiff is entitled to recover for two reasons:—

1st reason. One employee can recover of the principal or employer damages for injuries resulting from negligence of co-employee.

This question, we candidly confess, is not free from difficulty. We are not aware that the United States Courts have as yet passed upon this question. It is therefore, as to those Courts, a new question. Ith as been decided various ways in some of the State Courts, and some of those Courts who have given their opinions upon the question have been inclined to hold that a recovery, in case of injury from the negligence of a co-employee, cannot be had; but the better opinion of some of our most enlightened jurists of the present day appears to be strongly against this rule as being founded neither in justice, reason or commou sense, and in many cases working gross injustice; and any decision which limits or qualifies it in any way, even in those states which have adhered to it is welcomed by the professsion generally, both bench and bar. In fact, in those very States, the matter bas awakened public feeling and attention, so much so, that the Legislatures are taking the matter in hand and enacting laws for the protection of the employees and their families, by allowing recoveries in such cases where relief had before been denied them in the Courts. In Missouri the Code of 1855, page 647 gives the widow the right of action for the death of her husband through the negligence of a co-employee in the same general business. The State of Iowa has given the right of action for damages sustained by any person, against railroad companies, including employees of the company, in consequence of any neglect of the agents, or of any mismanagement of the engineers or other employees of the corporation; and even provides that this shall be the case "all contracts to the contrary notwithstanding." (See laws of Iowa, 9th General Assembly 1862, Chapter 169, as amended by laws of 1870, page 161. We respectfully refer the Court to the following authorities in support of the proposition that one employee can recover of the principal for injuries caused by negligence of co-employee:

Schultz vs. Pacific R. R., 36 Missouri, page 13, 11 Wisconsin 238; Chamberlain vs. Mil. & Miss. R. R. Co., 20 Ohio 415; Little Miami R. R. Co. vs. Stephens; Railroad Company vs. Keary, 3 Ohio St. Rep. 201, 262; Gillentwater vs. Madison & Indianapolis R. R. Co., 5 Port. (Ind.) 339, 340; Fitzpatrick vs. New Albany & Salem R. R. Co., 7 ib. 436, 336; Dixon vs. Rankin, 1 Amer. R. R. cases, 569. These cases fully sustain the proposition we have laid down, upon the well established doctrine of the Common Law, that the master is responsible for all injuries to others happening through the neglect of a servant in the course of his employment. See also McAunich vs. the M. & M. R. R. Co., 20 Iowa 338; Donalson vs. M. M. R. R. Co., 18 Iowa 280; Ney vs. D. & S. C. R. R. Co., Iowa 347.

2d reason. The deceased was employed in a special and not a general service, and was therefore, not engaged in the same general business with the persons whose negligeuce caused his death. The language of all the decisions which have held the employer not liable, is "engaged in the same general business." The reason given for these decisions, and the only reason is that the servant takes upon himself the risk of any injury he may receive from the negligence of his fellow servants with whom he employs in one common employment, because he can observe the conduct of the others, give notice of any misconduct, leave the service if carefnl and proper hands are not employed and is in a position to guard against and to a certain extent control, in some cases, the actions of his co-employees. This rule could certainly not apply in this case. The deceased was employed by the hour for about two and one-half hours, to carry freight aboard the boat. He could know nothing of the character of the men with whom he was employed, and was not engaged in a common employment or in the same general business with them. He had nothing whatever to do with the management of the boat. He had no duty to perform other than to carry aboard the freight from the warehouse to the boat. In those cases where the Courts have held the companies not liable, the employee was engaged in the same business with the persons whose negligence caused the injury. Take, for instance, the case of a brakeman on a railroad, which is of most common occurrence. He has an important part to enact in the running of the train with the other employees. It would not be contended for a moment, we presume, that a person on board of a train, although in the employment of the railroad company in another capacity, yet having nothing to do with the running or management of the train, could be regarded as an employee in the same general business with the persons running and managing the train, or as taking any risk in consequence of having engaged in the same general business with them. In this case the officers and crew aboard this boat, by and trough whose carelessness and negligence the injury was produced, all and each of them had important duties to perform in relation to the management and running of the boat The deceased had none whatever. The very act itself, of pulling in the stages or gangway planks on to and aboard the boat, which was the act injuring and causing the death of the deceased, was one over which he had no control, and in which he had no hand and could have none. Had deceased been injured while carrying aboard freight, for instance, by one of the crew letting fall a package and knocking him into the river and drowning him, there might be more plausibility in the argument of the plaintiff in error, "that he was injured while engaged in the same common business," because in that case the injury resulted from the very employment in which he

was engaged. But in the case before us, the injury was received in transacting a business in which he was not employed and had no right to assist in. Neither had the crew of said boat any control only as they obeyed the orders of their superior, the mate, who ordered the hauling in of the planks, and who was there in the place of the corporation ordering and commanding the crew.

In the case of Catawassa R, R. Co., vs. Armstrong, 49 Penn. St 186, it was held that where a person was in the sole employ of one railroad company, and is injured by the cars of another company who are permitted by the former to use their track, he is not precluded from recovering damages on the ground that he is in the same general employ with the servants of the latter. See also 19 N. Y. 127.

In the case Cooper vs. Mullins, 30 Georgia, 146, it was held that the rule that a servant cannot recover damages of his employer for injuries inflicted by a fellow servant, applies only where the servant receiving the injury is engaged with the servant inflicting it, in a common business, so that he has an opportunity to exercise a preventive care over his fellow servant's negligence.

In the case of Donaldson vs. Miss. & C. R R. Co., 18 Iowa, 280, it was held that sub-contractor for building bridges on railroad was not a co-servant with the employees manageing trains and action lies against the company for his death, through the negligence of the latter.

In the case of Abraham vs. Reynolds, 5 Hurl & Nor. 143, (E. Exchequer) it was held that where the plaintiff, a servant of J & Co., who were employed by the defendants to carry cotton from a warehouse, was receiving the cotton into his lorry, when through the negligence of the defendants' porters a bale fell upon him. Held that that the plaintiff and defendant's porters were not so, in the same employ, or engaged in a common object, as to take away the plaintiff's right of action

See also the case of Warburton vs. the Great Western Railway Company. Court of Exchequer, (England) Michaelmas term (November) 1866, reported in the "Western Jurist" for June, 1867, Vol. 1, No. 3, which was held that where two railway companies used the same station, which belonged to one of them, and the servants of both companies were governed by the station rules of that one, and an employee of one company was injured by negligence of an employee of the other, not in the course of any common employment under the same master, but in the discharge of his ordinary duty to his own company, it was held that the doctrine that one employee cannot recover for injuries caused by the negligence of co-employee did not apply, but that an action was maintainable. See also a very able note at the end of this last decision, wherein the rule above referred to is regarded as so manifestly unjust that this decision and any and all others which qualify and limit it are cordially welcomed

We respectfully refer the Court to the foregoing decisions to-wit:—Catawissa R. R. Co. vs Armstrong, 49 Penn. St 186; 19 N. Y. 127; Cooper vs Mullins, 30 Georgia, 146; Donaldson vs. Miss. & C. R R. Co., 18 Iowa 280; Abraham vs. Reynolds, 5 Hurl, and Nor. 143 (E. Exchequer); Warburton vs the Great Western Railway Company, Court of Exchequer (England) Michaelmas term (November) 1866, "Western Jurist" for June, 1867, Vol. 1, No 3, page 173; and note at end of decision.

Also the following cases: Gillenwater vs. the M. & I. R. Co., 5 Indiana, 339; Fitzpatrick vs. the N. A. & S. R. R. Co., 7 Indiana, 436. In these two cases the doctrine is clearly laid down that "a railroad company is liable to a servant for an injury occasioned by the negligence of other servants of the company, when the duties of the latter in connection with which the injury happened, were not common, nor in the same department with those of the injured servant, and where the negligence of the injured servant did not contribute to produce the injury."

See also Ney vs. D. & S. C. R. R. Co, 20 Iowa, 347; The Little Miami R. R. Co., vs. Stevens, 20 Ohio, 415: C. C. & C. R. R. Co., vs Keany, 3 Ohio St. 201; 8 N. Y. 175; 3 American Rep. 143; 2 id 497; 4 id. 616; this last decided and reported in 52 Ill., 401; a good case;

4th proposition. The Court did not err in submitting the question whether the employment had ceased, or whether deceased was in the employ of the plaintiff in error at the time he received the injuries, as a question of fact to the jury.

We are unable to see wherein this question differs from other questions of fact, or what there is about it which should make it a question of law for the Court If it be a question of law then we do not see why all the other questions in the case, which arise from the mere evidence as to how and in what manner the injuries occurred, and the subsequent death resulting therefrom, are not also questions of law, such as the question of negligence. We see no good reason for making any distinction between such questons, all of which are of the same nature, and are no more the province of the Court to determine than any other questions of fact which arise as conclusions from the evidence in the trial of a cause. To say that the Court should decide whether or not the deceased was in the employ of the said packet company at any particular time, or whether or not there was negligence, such as would authorize or defeat a recovery, on the part of either party, is certainly, in either case, calling upon the Court to decide a question of fact, and not of law, and is withdrawing from the jury the very matters, which they are called there to decide. In this case plaintiffs in error asked the Court to take the whole matter away from the jury, or in other words, do what amounted to the same thing, direct and instruct them that the conclusion of the Court upon the evidence was that the deceased was a servant at the time of the injury, and then direct them what their finding should be, to wit: that defendant in error was not entitled to recover. If this is correct doctrine then the empanneling of a jury in the case at all was a mere farce, a mere matter of form, and it might as well have been tried without one.

That these questions should properly be left by the Court with the jury has been decided in numerous cases, and in nearly, if not quite all the States of the Union, among which are the following:

14 N. Y. (4 Kernan) 310; Shelford on Railways, 753; 4 Am. Rep. 181; 17 Wis. 487; 38 N. Y. 131; 3 Kernan 22; 16 Barbour 353; 3 Kernan, 9; American R. R. cases, 121; Pierce on R. ways, page 282; Redfield on R. Ways, 306 and cases cited; 4 metcalf, page 50; See also Greenleaf vs, Illinois Central Railroad Co., 4 American Reports, 181; 29 Iowa, 14; also Shearm and Redf. on Negl. 8, Sec. 11; Beers vs. Housatonic R R. Co., 19 Conn. 566; Donaldson vs. the M. &. R. R. Co., 18 Iowa, 280, 288; Gordon admv., vs Pitt, 3 id. 385; Russ; vs the Steamboat War Eagle, 14 id. 363; McKay vs. Thorington, 15 id. 25; Spencer vs Milwaukee Co., 17 Wls. 487; Todd vs. Railroad Company, 3 Allen, 22; Tucker vs. Treutou Co., 6 Gray, 64; Nichols vs. 6th Av. Co., 38 N. Y. 131; Jeffersonvlle Co. vs. Hendricks, 26 Ind., 228; Penn. Co. vs. Zebe, 33 Peun, 318; Wilcox vs. R. & W. R. R. Co., 9 N Y. 358; Gonzales vs. N. Y. & H. Co., Leg. Jour. Vol, 7,120;

Galragan vs. B. & L. Co., 1 Allen, 187; Roach vs. Lloyd, 31 Penn. 358; Wyatt vs G. W. Co., 6 B. & S. 709; Sherman vs. Western Stage Co., 24 Iowa 515; Shearm & Redf. on Negl. § 11, and cases cited in note 3; Snow vs. Housatouic Co., 8 Allen, 441; Allen vs. Willard, 57 Penn. 380.

5th and lastly. The second proposition laid down by us must necessarily be answered in the affirmative, and hence the error of submitting said question to the jury, if an error at all, is without prejudice to the plaintiff in error.

The argument in support of this is already made under our 2d proposition.

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All of the foregoing is respectfully submitted to your Honorable Court by

DUTCHER & WEBSTER, &
G. C. HAZELTON
Attorneys for Defendant in errorr

GEO. W. LAKIN of Counsel.

Mutch & Carpenter
Of Counsel

SUPREME COURT OF THE UNITED STATES

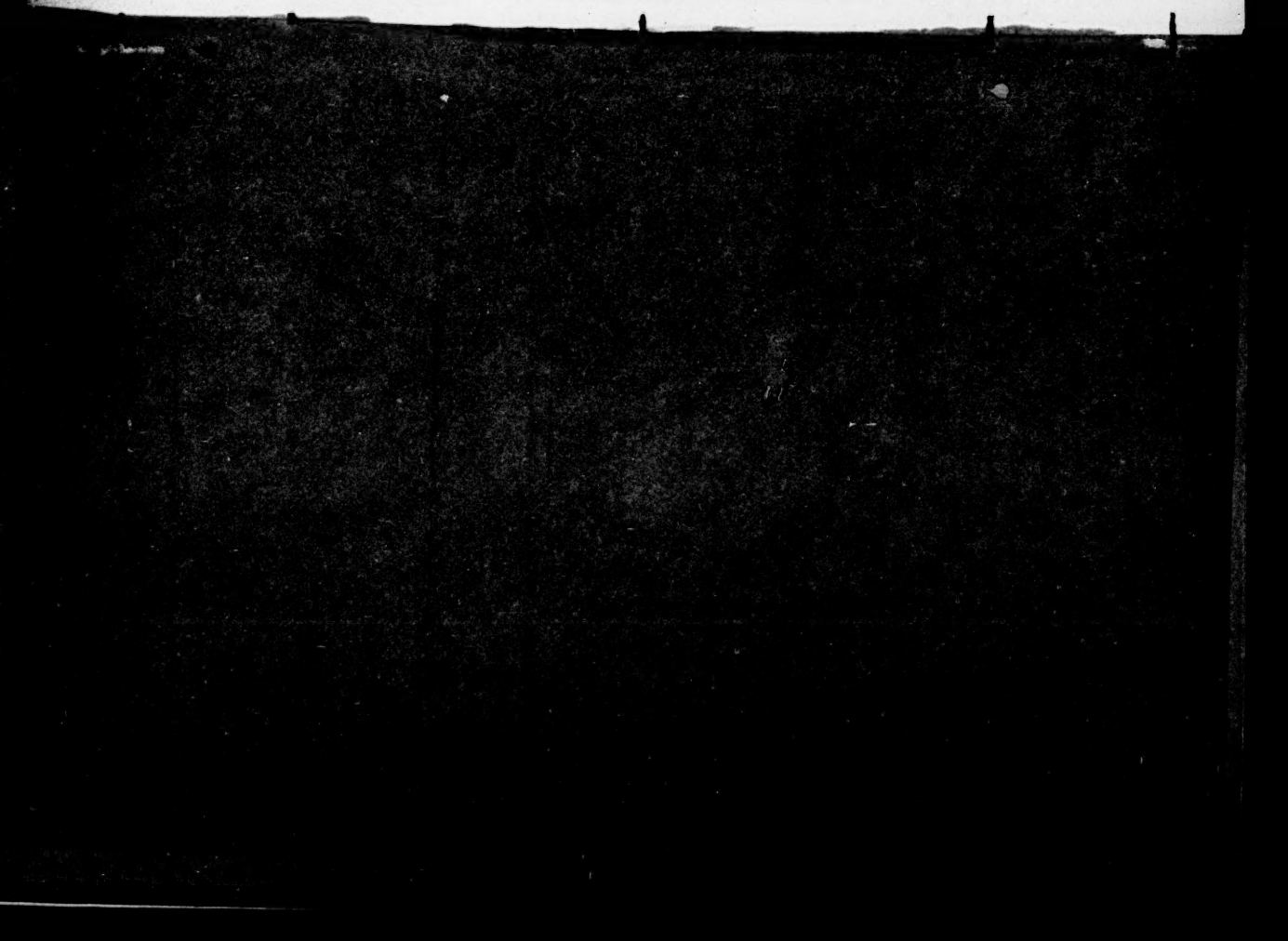
No. ····.

THE NORTHWESTERN UNION PACKET COMPANY,
PLAINTIFF IN ERROR.

vs.

MARY McCUE, ADMINISTRATIX OF THE ESTATE
OF PATRICK McCUE, DECEASED.

SUPPLEMENT TO BRIEF OF DEFENDANT IN ERROR.



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The counsel for the plaintiff in error, insist that if, at the time of the injury, Patrick McCue was an employee of the Packet Company, and was injured by the carelessness of a co-employee, then, as a matter of law, a recovery cannot be had for the injury.

That assumption, as sought to be applied to this case, is unsound in principle, and not sustained by adjudicated cases.

The assumption is one which is calculated to mislead, for the reason that in a majority of the reported cases, the injuries for which remedies have been sought have been caused by persons or co-employees, engaged in the same business, or departments.

Hence, in laying down or stating the law applicable to *such cases*, it has been usually given in general terms, as contended for by counsel for the plaintiff in error.

For the purpose of the argument, concede the *general rule* of law to be as contended for. What is the exception to that rule? (For there is rarely any rule without an exception.) It is this, that where the injured person is employed for a short time, to do a specific thing, not connected with, but foreign to the care and supervision of the business, in which the general employees are engaged, the rule contended for does not apply. In fact, and in

truth, such person is not a *co-employee*, with the general workmen, nor within the rule which bars him of his remedy, in case he is injured by their carelessness.

For example: The captain of the boat calls a physician from the wharf to his cabin to prescribe for a chill. The doctor acts promptly, and in less than ten minutes he has earned his dollar, received his pay, and is on the gang-plank to go ashore; and, without any fault of his, the managers of the craft pull the plank from under his feet, and dislocate his shoulder—what is his remedy? The plaintiff in error says he has no remedy for the injury—because he was a co-employee!

Again. A notary or a judge is called on board by the boat-owners to take a deposition or to write the will of one of them *in extremis*. He does his hour's work, and then seeks to go ashore and is jostled overboard by the carelessness of the boat's crew, and is seriously damaged. Is he without remedy merely because he was employed by the boat-owners, who also employed the crew by whose carelessness he was damaged?

Again. For fifty cents cash, paid in advance, the Diviner is employed by the Packet Company, for half an hour, to come from the beach on board the boat to tell the officesr' fortunes. At 12 o'clock noon, precisely, his half hour expires. When the clock strikes his work is done satisfactorily, and he makes haste, with due care, to go ashore; and, while on the gang-plank, the proper officer gives the order to pull it in. It is done, and the Diviner is pitched overboard. Who is responsible for the damages?

Examples showing the fallacy of the principle contended for, might be multiplied *ad infinitum*.

The case at bar is a parallel one. Patrick McCue was temporarily employed, in specific work, while the boat was at the wharf which had nothing to do with the care, or management of the craft. He was not employed *in common* with the boat's crew, and, therefore, was not a co-employee, in any such sense as to debar him of his remedy.

Every well considered adjudication is founded in principle and good reason. The reason for disallowing an action in favor of a

person for an injury occasioned by the carelessness of co-employees is this, that they are all, in common, by virtue of their employment, in duty bound to guard against accidents, so that the carelessness of one is, in some sense and degree, the carelessness of all the crews They are all in fault. But what fault or guilt can be adjudged against the Doctor or the Judge, in the examples above supposed? And, I ask, what fault can be adjudged against Patrick McCue in the case at bar, that he should be without the shadow of a remedy? The doctrine sought to be established by the plaintiff in error, is rotten to the root. It cannot be sustained on principle, or by reason, or by any established adjudication.

But, to sustain the judgment of the Court below, it is not necessary to maintain, or to establish the principles, or the doctoine, above asserted by the defendant in error.

She has, in her declaration, most truthfully provided against the false and groundless position. She shows by definite and specific averments the exact nature and extent of Patrick McCue's employment by the Packet Company; and, further, that "after his term of labor had ceased and was ended (see Record fol. 38), and after the expiration of the time during which said Patrick McCue had before then agreed to work for the said defendant," (pl'tff in error) the cause of action accrued. That is to say, the clock had struck the hour that terminated the special, temporary service. He was then "his *own master*"—under no obligation to linger on board to dun them for his dollar, or his death-blow.

Now, the simple facts and circumstances of the whole thing are set forth with definiteness in the declaration, and the verdict of the jury indorses every material allegation, and especially that one, which is so prominent in the pleading, to-wit, that the time of his employment had expired, and was ended, before the injury happened. The verdict shows that the declaration is true. That every material fact therein stated is proven.

How, then, can it be insisted that Patrick McCue was, *in any sense*, the employee of the Packet Company, when the injury happened?

The exception taken by counsel would indicate, that the Court erred in permitting the jury to pass upon the averment that the time of the employment was ended, before McCue was injured. That is to say, counsel claim that the lapse of time which terminated the hour of employment, is a *point of law*; and, therefore, the Court erred in submitting it to the jury. Such claim is unfounded—not to say absurd.

The non-expert and unlearned record the day and the hour of the birth and death of their children and friends. The novice notes the time—the hour of his rising and of his retiring; of the beginning, and especially of the ending of his day's labor, and never imagines that he is deciding points of law. The sun-rising the sun-setting guns are discharged, at the appointed time, and no process of reasoning is required to determine the fact, simply because they are facts, and not points of law.

Just so clear is it, that at the precise time, when his hour was up, Patrick McCue's term of employment ceased. And the fact was as simple, and as easily ascertained, as it was to note the hour on the dial.

The Court below was right in allowing the jury to determine, and find the fact. And the jury did find it, in terms, and specifically. (Record, fol. 63.)

Where the error is on which counsel predicate a hope of a reversal of the judgment, and a third trial, it is difficult to determine.

GEO. W. LAKIN,

Counsel for Defendant in Error.